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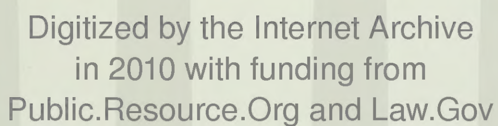
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2981

# No. 15235

## United States
# Court of Appeals
### for the Ninth Circuit

GEORGE H. COX, also known as GEORGE M. COX, Appellant,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., Appellees.

# Transcript of Record

Appeal from the United States District Court for the Northern District of California, Northern Division

FILED

DEC - 3 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. —11-12-56

No. 15235

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

L. C. SMITH,
LEANDER W. PITMAN,
1321 Yuba Street,
Redding, California,
DEVLIN, DIEPENBROCK & WULFF,
HORACE B. WULFF,
414 - 926 J Building,
Sacramento, California,

Attorneys for the Plaintiff-Appellant.

HAUERKEN, ST. CLAIR & VIADRO,
GEORGE H. HAUERKEN,
635 Russ Building, 235 Montgomery Street,
San Francisco 4, California,
KENNEDY & CALDWELL,
1215 Placer Street, Redding, California,

Attorneys for the Defendants-Appellees.

In the Superior Court of the State of California in and for the County of Shasta

Exhibit "2"

No. 19784

GEORGE H. COX, aka, GEORGE M. COX,
Plaintiff,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation,
Defendants.

COMPLAINT

(Breach of Contract)

Comes now the plaintiff, in the above entitled action and for cause of action alleges:

I.

That the contract on which this cause of action is based is in writing.

II.

That at all times herein mentioned, the defendant, The London and Lancashire Insurance Company, Ltd., was, and now is, a foreign corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, and authorized to write and sell policies insuring against loss by fire. That said defendants was at said times authorized to carry on the business of writing policies of insurance in the State of California, by and through resident agents, and that one Frank B.

Plummer was its duly authorized agent at Redding, California.

III.

That plaintiff is not aware of the true capacity of defendant English-American Underwriters, whether individual, associate, corporate or otherwise; that leave of court will be asked to amend this complaint to show said defendant's true capacity when the same has been ascertained.

IV.

That on the 19th day of December, 1952, to and including the date of the fire hereinafter mentioned, the plaintiff was the owner of a dwelling house, household furniture and the personal property therein, at or near the City of Redding, County of Shasta, State of California, which said dwelling and household furniture and personal property therein, was covered by and included in the policy of insurance issued by defendants herein referred to.

V.

That in consideration of the premium of One Hundred Sixty-two and 50/100 ($162.50) Dollars paid to it by the plaintiff, the defendants, by its policy of insurance signed by one of its managers in the City of San Francisco, California, acting under power of attorney, and countersigned by its general agent, the DeVeuve & Company, at San Francisco, California, under date of December 24, 1952, and delivered to the plaintiff in the City of Redding, California, a copy of which policy of in-

surance is hereto annexed, marked "Exhibit A", and by this reference made a part hereof, insured the plaintiff against loss or damage by fire to the amount of Thirteen Thousand and no/100 ($13,000.00) Dollars on said property, from the 19th day of December, 1952, at 12 o'clock noon to December 19, 1955, at 12 o'clock noon.

VI.

That the plaintiff has duly performed all the conditions on his part to be performed, and on the 25th day of January, 1953, said dwelling and personal property were greatly damaged, in fact were totally consumed and destroyed by fire. That said fire did not occur from any of the causes excepted in said policy.

VII.

That the plaintiff's loss occasioned thereby was Eighteen Thousand Six Hundred Twenty-one and 57/100 ($18,621.57) Dollars.

VIII.

That the plaintiff immediately thereafter, on or about the 26th day of January, 1953, notified the defendants of said loss, and on or about the 20th day of March, 1953, and more than sixty days prior to the commencement of this action, furnished the defendants with due proof of said loss in writing. Subsequently on January 13, 1954, furnished said defendants with a Supplemental proof of Loss, which Supplemental proof of Loss was furnished at the request of said defendants.

IX.

That plaintiff received notice in writing on January 6, 1954, of defendants' election to appoint an appraiser, under the provisions of the aforesaid policy and thereafter plaintiff appointed an appraiser on the 15th day of January, 1954, but notwithstanding that plaintiff has complied with all the terms, covenants and conditions set forth and contained in said policy, said defendants have failed and refused, and still fail and refuse, to pay said plaintiff the sum of $13,000.00 due under the terms of said policy or any part or portion thereof. That no part of said loss has been paid, and the sum of $13,000.00 is now due, owing and unpaid from defendants to plaintiff, to plaintiff's damage in said sum. That no return or award of the aforesaid appraisers has been made or filed with either the plaintiff or the defendants prior to the filing of this complaint; that under the provisions of the aforesaid policy the time for commencement of suit will expire on January 25, 1954.

X.

That at all times herein mentioned the dwelling house owned by the plaintiff, as aforesaid, was occupied for dwelling house purposes with the aforesaid furniture and personal property therein.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of $13,-000.00 with interest thereon at the rate of seven per cent per annum from March 20, 1953, to and

including date of judgment, together with his costs of suit incurred herein.

L. C. SMITH and
LEANDER W. PITMAN,
Attorneys for Plaintiff

Duly Verified.

[Endorsed]: Filed March 9, 1954.

---

In the United States District Court for the Northern District of California, Northern Division

No. 7037

GEORGE H. COX, also known as GEORGE M. COX, Plaintiff,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation, Defendants.

## ANSWER TO COMPLAINT

In answer to the complaint on file herein, defendant The London and Lancashire Insurance Company, Ltd., a corporation (sued herein as English American Underwriters and as The London & Lancashire Insurance Company, Ltd., a corporation) admits, denies and alleges as follows:

I.

Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph IV.

II.

Defendant admits the allegations contained in Paragraph V except that defendant alleges that the copy of the policy of insurance attached to the complaint is not a complete copy of the policy issued by defendant to plaintiff in that it lacks an endorsement dated January 9, 1953, providing for a return premium of $13.00 from defendant to plaintiff.

III.

In answer to Paragraph VI, defendant denies that plaintiff has duly performed all the conditions on his part to be performed; defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said Paragraph VI; further answering said Paragraph VI, defendant alleges that plaintiff failed to render to defendant, within sixty days after the fire referred to in said paragraph VI or within any other time, a proof of loss as required by said policy; defendant further alleges that, although such an examination was demanded of him, plaintiff failed and refused to submit to an examination under oath as required in said policy; defendant further alleges that, as provided by said policy, it demanded an appraisement of said loss, that said appraisement has not yet been completed and that the award of the appraisers has not yet been filed with defendant.

IV.

Defendant denies each and every allegation con-

tained in Paragraph VII; further answering said Paragraph VII, defendant denies that plaintiff's loss was the sum of $18,621.57 or any other sum, or any sum at all.

V.

Defendant denies each and every allegation contained in Paragraph VIII.

VI.

In answer to Paragraph IX, defendant admits and/or alleges that it gave notice to plaintiff, on December 23, 1953, of its election to appoint an appraiser, but defendant is without knowledge or information sufficient to form a belief as to when plaintiff received notice of defendant's election to appoint an appraiser; defendant admits that plaintiff appointed an appraiser on or about January 15, 1954; that it has not paid to plaintiff the sum of $13,000, or any other sum; that the award of the appraisers had not been filed at the time of the filing of said complaint and has not yet been filed; further answering said Paragraph IX, defendant admits and/or alleges that, under the provisions of said policy, the time for the commencement of suit expires twelve months after the loss; as heretofore alleged, defendant does not know the date of plaintiff's alleged loss and defendant is accordingly without knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations regarding the expiration of the time to commence suit under the policy; defendant denies each and

every other allegation contained in said Paragraph IX.

VII.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X.

First Affirmative Defense

The complaint fails to state a claim upon which relief can be granted.

Second Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said policy shall be sustainable unless all the requirements of said policy shall have been complied with.

II.

Said policy requires the assured to render to the company a proof of loss, as described in said policy, within sixty days after the loss.

III.

Plaintiff failed to render to defendant the proof of loss required by said policy either within sixty days after the date of his alleged loss or within any other period of time; by reason of the foregoing, plaintiff is barred from recovery in this action.

Third Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said

policy shall be sustainable unless all the requirements of said policy shall have been complied with.

II.

Said policy requires the assured to submit, as often as may be reasonably required, to examinations under oath by a person named by the company.

III.

Plaintiff failed to submit to such an examination under oath although such an examination was demanded of him by defendant; by reason of the foregoing, plaintiff is barred from recovery in this action.

Fourth Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said policy shall be sustainable unless all the requirements of the policy shall have been complied with.

II.

Said policy provides that, in case the assured and the company fail to agree as to the amount of the loss, said amount shall be determined by appraisers appointed in accordance with the terms of said policy.

III.

Plaintiff and defendant failed to agree as to the amount of plaintiff's alleged loss and, in accordance with the foregoing terms of said policy, defendant demanded that the amount of the loss be appraised;

said appraisement has not yet been completed and no award has been filed by the appraisers; by reason of the foregoing, plaintiff is barred from recovery in this action.

Fifth Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides as follows:

"This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto."

II.

Defendant is informed and believes and therefore alleges on information and belief that, before the alleged loss, plaintiff wilfully concealed and misrepresented to defendant material facts concerning the subject of the insurance and particularly concerning the value of the property insured under said policy; and that, subsequent to the alleged loss, plaintiff was guilty of false swearing relating thereto; by reason of the foregoing plaintiff is barred from recovery in this action.

Sixth Affirmative Defense

I.

The policy of insurance issued by defendant to plaintiff provides that no suit or action on said

policy shall be sustainable unless all the requirements of the policy shall have been complied with.

II.

Said policy requires the assured to furnish to the company a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed.

III.

Plaintiff failed to furnish such an inventory although such an inventory was demanded of him by defendant; by reason of the foregoing, plaintiff is barred from recovery in this action.

Wherefore, defendant prays judgment that plaintiff take nothing by his complaint and that defendant have its costs of suit incurred herein and such further relief as is proper in the premises.

/s/ GEORGE H. HAUERKEN,
/s/ HAUERKEN, ST. CLAIR & VIADRO,
/s/ KENNEDY & CALDWELL,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 16, 1954.

[Title of District Court and Cause.]

## NOTICE OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT

To the plaintiff above named and to L. C. Smith and Leander W. Pitman, his attorneys.

Take notice that on Monday, 8 November 1954, in the Courtroom of the above entitled court located in the United States Post Office and Courts Building on Eye Street between Eighth and Ninth, Sacramento, California, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, the above named defendant will move the court for summary judgment, all as more fully set forth in the Motion for Summary Judgment filed and served herewith.

Said motion will be made upon the grounds specified in the attached motion papers and will be based upon this notice, said motion papers and the pleadings, records and files in this action, together with the affidavits served herewith.

Dated at San Francisco, California, 18 October, 1954.

/s/ GEORGE H. HAUERKEN,
/s/ HAUERKEN, ST. CLAIR & VIADRO,
/s/ KENNEDY & CALDWELL,

Acknowledgment of Service attached.

## MOTION FOR SUMMARY JUDGMENT

The defendant, The London & Lancashire Insurance Company, Ltd., a corporation, (sued herein as English-American Underwriters and as The London

& Lancashire Insurance Company, Ltd., a corporation) by George H. Hauerken, Hauerken, St. Clair & Viadro and Kennedy & Caldwell, its attorneys, hereby moves the court to enter summary judgment for the defendant, in accordance with the provisions of Rule 56 (b) and (c) of the Rules of Civil Procedure, on the grounds that the pleadings and affidavits of:

(1) John W. Smith
(2) Laurence J. Kennedy, Jr.
(3) A. J. Stocklmier
(4) H. T. Russell
(5) George H. Hauerken

hereto attached show that the defendant is entitled to judgment as a matter of law.

/s/ GEORGE H. HAUERKEN,
/s/ HAUERKEN, ST. CLAIR & VIADRO,
/s/ KENNEDY & CALDWELL,
Attorneys for Defendant

Supporting Memorandum

The submission to arbitration is a condition precedent to the filing of a cause of action under a fire insurance policy, and until such submission is made, no cause of action exists. See:

(1) The photo copy of the policy attached to the complaint and particularly lines 117 to 133, inclusive.

(2) Sauzelito L. & DD Co. vs. Commercial Union Insurance Company, 66 Cal. 253.

(3) Adams vs. South British & National Fire & Marine Insurance Company of New Zealand, 70 Cal. 198.

(4) Section 2071 of the Insurance Code of California.

## SUMMARY JUDGMENT (PROPOSED)

The motion of the defendant for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure having been presented and the court being fully advised, the court finds that there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action, and that the plaintiff did not submit to, and that there has been no appraisal pursuant to the terms of the policy of insurance, prior to the filing of this action, and that the defendant is entitled to a summary judgment.

It Is Therefore Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same is hereby, granted, and that defendant recover its costs and charges pursuant to law.

Dated: November ........, 1954.

.................................................,

Judge of U. S. District Court

AFFIDAVIT OF JOHN W. SMITH

State of Maine,
County of Knox—ss.

John W. Smith, being first duly sworn, deposes and says:

I am John W. Smith and have personal knowledge of the facts herein set forth.

On 20 March 1953, the Sacramento office of General Adjustment Bureau, Inc., in which office I am an adjuster in the Fire Division, received a Proof of Loss dated 16 March 1953 purportedly signed by plaintiff with respect to damages alleged to have been sustained as a result of the fire referred to in the Complaint on file herein, and which Proof of Loss showed a claim in the amount of Twelve Thousand ($12,000) Dollars. A photo copy of said Proof of Loss is attached hereto marked Exhibit "A" and made a part of this affidavit.

On 29 April, 1953, I wrote a letter to plaintiff on behalf of the defendant requesting an examination under oath on 7 May 1953, a copy of which letter is attached hereto marked Exhibit "B" and made a part of this affidavit.

On 30 April, 1953, I wrote a letter to plaintiff on behalf of the defendant taking exception to the Proof of Loss, a copy of which letter is attached hereto marked Exhibit "C" and made a part of this affidavit.

Both said letters of 29 April and 30 April, 1953 were placed by me in the United States mail, postage prepaid, and addressed to plaintiff at his post

office address known to me to be care of Redding Tire Service, 2638 Angelo, Redding, California.

/s/ JOHN W. SMITH

Subscribed and sworn to before me this 9 day of October, 1954.

[Seal] /s/ ELMER C. DAVIS,

Notary Public in and for the County of Knox, State of Maine.

EXHIBIT "A"

SWORN STATEMENT IN PROOF OF LOSS

Policy Number: 983103.

Amount of Policy: $13,000.

Issued: Dec. 19, 1952; Expires: Dec. 19, 1955.

Agency Name: Frank Plummer, Redding.

To the English-American Underwriters—Agency of London, and Lancashire Insurance Company—London, England.

At the time of loss, by the above indicated policy of insurance you insured George H. Cox against loss by Fire upon the property described under Schedule "A", according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

1. Time and Origin: A fire loss occurred about the hour of 1:20 o'clock a.m., on the 25 day of January, 1953. The cause and origin of the said loss were: Undetermined.

2. Occupancy: The building described, or containing the property described, was occupied at the

time of the loss as follows, and for no other purpose whatever: Dwelling.

3. Title and Interest: At the time of the loss the interest of your insured in the property described was: Owner. No other person or persons had any interest therein or incumbrance thereon, except.........

4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except: None.

5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, $13,000, as more particularly specified in the apportionment attached under Schedule "C", besides which there was no policy or other contract of insurance, written or oral, valid or invalid.

6. The Cash Value of said property at the time of the loss was $14,670.40.

7. The Whole Loss and Damage as stated under Schedule "B" was $14,670.40.

8. The Amount Claimed under the above numbered policy is $12,000.00.

The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the

time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to the extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

/s/ GEORGE H. COX, Insured

State of California,
County of Shasta—ss.

Subscribed and sworn to before me this 16th day of March, 1953.

/s/ [Illegible], Notary Public

Schedule "A"—Policy Form

Policy Form No. S. F. B.-184-C. Dated 4/50.

Item 1. $10,000.00 on dwelling.

Item 2. $3,000.00 on H. H. F.

* * * * *

Situated approximately—3 miles South Redding N/S—West End—Olney Creek Rd.

* * * * *

Loss, if any, payable to assured.

* * * * *

EXHIBIT "B"

General Adjustment Bureau, Inc.
906-15th Street, Sacramento 14, California

Registered Letter Return Receipt Requested—Deliver to Addressee Only. April 29, 1953

Mr. George M. Cox
c/o Redding Tire Service
2638 Angelo, Redding, California

Re: English-American Underwriters Agency of The London & Lancashire Insurance Co. Policy No. P 983103. Bureau File RED-3-168-F.

Dear Mr. Cox:

You are hereby advised and you will please take notice that the undersigned English-American Underwriters Agency of The London & Lancashire Insurance Company, Ltd., has elected to, and in accordance with the pertinent provisions of the above described policy does hereby elect to examine you, under oath, with reference to the fire loss which is alleged to have occurred on January 25, 1953 and with respect to the contents of the purported Proof of Loss thereafter delivered by you to said company in connection with your claimed loss resulting from said fire.

You are hereby notified that said sworn examination will be conducted by Attorney Laurence J. Kennedy, Jr. at his office in the Shasta County Court House, Redding, California, on Thursday morning May 7, 1953 at 10:00 a.m. on said date.

You are hereby notified, in accordance with the terms and conditions of said policy, to be present at

said time and place for the purpose of said sworn examination. If impossible to be in the office of the attorney at the time specified, please telephone Mr. Kennedy.

Yours very truly,

English-American Underwriters Agency of The London & Lancashire Insurance Company, Ltd.

By General Adjustment Bureau, Inc.

By John W. Smith,
Adjusting Representative

JWS-c

EXHIBIT "C"

General Adjustment Bureau, Inc.
906-15th Street, Sacramento 14, California

Registered—Return Receipt Requested—Deliver to Addressee Only. April 30, 1953

Mr. George M. Cox
c/o Redding Tire Service
2638 Angelo, Redding, California

Re: English-American Underwriters of London and Lancashire Insurance Company. Policy No. P 983103. Bureau File BED-3-168-F.

Dear Mr. Cox:

The English-American Underwriters of The London and Lancashire Insurance Company hereby acknowledges receipt of an instrument purporting to be Proofs of Loss under its Policy No. P 983103, which instrument is dated March 16, 1953 and was received by said Company on March 20, 1953.

You are hereby notified that this purported Proof

of Loss does not fulfill the requirements of the terms and conditions of the above numbered policy for the following reasons:

In said instrument the total cash value and loss and damage is stated at $14,670.40, but no analysis or breakdown of this figure is given, nor is there any detailed statement of loss other than this lump sum given, nor is there any data contained in the said instrument from which these matters can be determined.

Said instrument does not state the nature of your interest and the interests of all others in the propery nor the encumbrances, if any, and the amount thereof upon the property described in the above numbered policy.

Said instrument refers to George H. Cox as having an interest in said property described in the above numbered policy but does not state the nature and extent of his interest.

Said instrument does not state the insured's belief as to the origin of said loss. It is only stated that the origin is unknown to him.

Because of these defects in the purported Proofs of Loss, you may wish to remedy this incompleteness by filing amendments correcting the hereinabove deficiencies to the end that the undersigned insurance company may have suitable evidence upon which they may intelligently determine the amount of loss and the extent of their liability, if any, under the terms and conditions of their policy for the alleged claim. If so, such amendments should be properly acknowledged and identified as intended

to form a part of the purported Proof of Loss heretofore filed.

You are hereby notified and required to furnish this company with verified plans and specifications of the building claimed to have been destroyed or damaged.

The writing of this letter and the retention of the purported Proofs of Loss which have been filed shall not be construed as an admission or denial of liability or an admission of the amount of loss claimed by you or a waiver on the part of the undersigned company of any of the terms, conditions or provisions of its policy contract or any forfeitures thereunder, but the same are hereby specifically reserved.

Yours very truly,

English-American Underwriters of London and Lancashire Insurance Company

By General Adjustment Bureau, Inc.
Adjusting Representatives

Per: ..................................
John W. Smith, Adjuster
Fire Division

JWS:m

## AFFIDAVIT OF LAURENCE J. KENNEDY, JR.

State of California,
County of Shasta—ss.

Laurence J. Kennedy, Jr., being first duly sworn, deposes and says:

I am Laurence J. Kennedy, Jr. and have personal knowledge of the facts herein set forth.

Referring to letter of 29 April 1953 in the Affidavit of John W. Smith filed concurrently herewith, I am the Laurence J. Kennedy, Jr. named in said letter.

Plaintiff did not appear at my office in the Shasta County Court House, Redding, California, on Thursday morning, May 7, 1953 at 10:00 a.m. of said date or at any other time up to 7 January 1954 for the purposes referred to in said letter of 29 April 1953.

On 8 May 1953, I received a letter in the ordinary course of mail from L. C. Smith, a copy of which is attached hereto marked Exhibit "A" and made a part of this affidavit.

Plaintiff herein filed action 19286 in the Superior Court of the State of California, in and for the County of Shasta, against the defendant herein, through his attorneys, L. C. Smith and Leander W. Pitman. On 17 July 1953, the undersigned, through his firm Kennedy & Caldwell, filed an answer to said action on behalf of the defendant. On 4 November 1953, a judgment of non-suit was entered in said action in favor of the defendant and against the plaintiff on the grounds that plaintiff had re-

fused to comply with the provisions in the policy pertaining to examination under oath specifically requested in letter dated 29 April 1953 attached to the John W. Smith affidavit filed concurrently herewith.

On 7 January 1954, pursuant to letter written by plaintiff to defendant under date of 21 December 1953 offering to submit to examination under oath and pursuant to letter written by defendant to plaintiff under date of 23 December 1953 accepting said offer, both of which letters are attached to the affidavit of A. J. Stocklmier filed concurrently herewith, plaintiff appeared for oral examination at the office of affiant and was orally examined.

/s/ LAURENCE J. KENNEDY, JR.

Subscribed and sworn to before me this 1st day of October, 1954.

[Seal] /s/ MARY L. McKINNEY,

Notary Public in and for the County of Shasta, State of California.

EXHIBIT "A"

Lawrence Kennedy, Jr. May 7, 1953
Attorney at Law
Courthouse, Redding, California

Dear Mr. Kennedy:

I am writing in connection with the claim of George Cox, Policy No. P983103, upon which there has been a number of oral and written examinations, not less than four in number, some of which

were reduced to writing and under oath, and now you want another one. After all, there is an end to this third degree some place.

We regard your present action as not a reasonable request within the terms of the policy, but one to annoy and harrass these people as a substitute for your promise to pay in the event of a loss. For these reasons your request for another and additional oral examination is refused.

When we bring suit, you will again have the right to take these people's deposition, if you feel so disposed. At that time they will be represented by counsel and the necessary interrogations will be confined and circumscribed by rules of evidence.

Very truly yours,

LCS:jss L. C. Smith

AFFIDAVIT OF A. J. STOCKLMIER

State of California,
City and County of San Francisco—ss.

A. J. Stocklmier, being first duly sworn, deposes and says:

I am A. J. Stocklmier and have personal knowledge of the facts herein set forth.

On 21 December 1953, plaintiff wrote a letter to the defendant, care of my attention as manager of the defendant, offering to submit to examination under oath, a copy of which is attached hereto marked Exhibit "A" and made a part of this affidavit.

On 23 December 1953 and in response to said

letter of 21 December 1953, I wrote a letter to plaintiff, a copy of which letter is attached hereto marked Exhibit "B" and made a part of this affidavit.

On 13 January 1954, plaintiff wrote a letter to defendant, care of my attention as manager of defendant, a copy of which is attached hereto marked Exhibit "C" and made a part of this affidavit.

With said letter of 13 January 1954, plaintiff enclosed a Supplemental Proof of Loss suggested in letter of 30 April 1953 by John W. Smith as indicated in the John W. Smith affidavit filed concurrently herewith.

Said letter of 23 December 1953 was placed by me in the United States mail, postage prepaid, addressed to plaintiff at Box 704, Redding, California, his post office address as indicated in the letter of 21 December 1953, Exhibit "A".

At all times mentioned in the complaint on file herein, I was and now am the manager of the defendant, and the General Adjustment Bureau, Inc., through John W. Smith, was our adjusting representative with respect to the matter referred to in the complaint on file herein.

/s/ A. J. STOCKLMIER,
Manager and Attorney in Fact

Subscribed and sworn to before me this 30th day of September, 1954.

[Seal] /s/ SELMA R. CONLAN,
Notary Public in and for the City and County of San Francisco, State of California

EXHIBIT "A"

Box 704, Redding, California
December 21, 1953

The London and Lancashire Insurance Co., Ltd.
c/o A. J. Stocklmier
Manager and General Process Agent for California
332 Pine Street, San Francisco 4, California

Re: Policy No. PCD 983103

Gentlemen:

Reference is made to your fire policy No. PCD 983103 issued to me covering a frame dwelling approximately three miles south of Redding, Shasta County, California, on the north side of West and Olney Creek Road in the sum of $10,000.00, and furniture and fixtures located therein in the sum of $3,000.00.

Proof of loss having been heretofore made to your Company and suit for the collection of the benefits of the policy was filed in the Superior Court of Shasta County in an action entitled, "Cox vs. The London and Lancashire Insurance Company, Ltd., a corporation, and numbered therein 19286, at which time there was moved, during the course of the trial, that a judgment of non-suit be granted upon the ground and for the reason that I had not submitted to an oral examination under oath. The fire occurred on January 25, 1953.

You are hereby notified, and you will please take notice that I will submit and am now offering to submit to an oral examination under oath, relating to competent and material matters connected with

the issuance of the policy and the loss claimed thereunder, and should you fail to request me to submit to such an examination, your right to have such examination will and is intended to be by you waived.

Very truly yours,

George H. Cox, aka
George M. Cox

EXHIBIT "B"

December 23, 1953

Registered letter—Return Receipt Requested.
George H. Cox, also known as George M. Cox
Box 704, Redding, California

Re: Policy No. PCD 983103

Dear Mr. Cox:

Your registered mail letter of December 21, 1953 offering to now submit to an examination under oath was received by us on December 22, 1953.

We accept your offer to submit to an examination under oath and designate the 7th day of January, 1954 at 10:00 a.m. in the office of Laurence J. Kennedy, Jr., Esq., at the Courthouse in Redding, California, as the time and place for the taking of the examination under oath, and we further designate Mary McKinney, a notary public, as a person before whom such examination under oath may be taken, and advise that in the event that said Mary McKinney be not available, that the examination under oath be taken before some other notary public.

The examination will be conducted by our attorneys, George H. Hauerken, 535 Russ Building, San Francisco, California, Telephone GArfield 1-2462, and Laurence J. Kennedy, Jr., Courthouse, Redding, California, telephone 956. If the examination is not completed on that day, it will be continued from day to day thereafter at the same place between the hours of 10:00 a.m. and 5:00 p.m. until completed.

If that date is unsatisfactory to you, please communicate in writing with Mr. Hauerken or Mr. Kennedy. Either is authorized to agree with you as to another date, but their agreement must be in writing.

We hereby invoke the provisions of the policy of insurance calling for an appraisal and hereby demand that an appraisal be had pursuant to the policy terms and conditions. We hereby select Howard T. Russell, c/o C. J. Hopkinson Co., 1810 - 28th Street, Sacramento, California, Telephone HIllcrest 6-6423, as our appraiser. We ask that you be good enough to advise us, in writing, and that you also advise our appraiser, in writing, within the time provided by the policy, of the name and address of the appraiser selected by you pursuant to the terms and conditions of the policy.

Very truly yours,

London & Lancashire Insurance Company, Ltd.

By ........................,
A. J. Stocklmier, Manager

EXHIBIT "C"

L. C. Smith, Attorney at Law
Redding, California

Telephone 66 January 13, 1954

The London & Lancashire Insurance Co., Ltd.
c/o A. J. Stocklmier, Manager and General Process
Agent for California
332 Pine Street, San Francisco 4, California

Re: Policy PCD 983103

Gentlemen:

Your letter of December 23 reached me on the night of January 6, 1954, it having been sent to Box 704, Redding, California, and pursuant to that letter I appeared at the office Laurence J. Kennedy, Jr. at 10:00 a.m. with my counsel, Leander Pitman, and testified under oath before a Notary Public in the presence of a Court Reporter, who took it down in shorthand and agreed to transcribe the proceedings.

The examination was conducted by George H. Hauerken, 535 Russ Building, San Francisco, California, and was completed on the 7th day of January, 1954.

Reference is made to the last paragraph of your letter wherein you select Howard T. Russell as an appraiser and ask for the name and address of the appraiser selected by me.

Without admitting and reserving the right to object and protest to the appointment of Howard T. Russell as a disinterested appraiser and with-

out waiving that feature of the policy, I nominate, appoint and name H. J. Bachtold, 1740 Chestnut Street, Redding, California, as a competent and disinterested appraiser and have authorized and directed him to contact you, or you may contact him, for immediate performance of the duties prescribed by the terms of my Policy No. PCD 983103.

I also enclose herewith Supplemental Proof of Loss.

I demand that you, forthwith, and in any event on or before January 22, 1954 at 4:00 o'clock p.m. of said day, pay to me the sum of $13,000.00 for the loss sustained by the fire, covered by the Policy No. PCD 983103, and if payment of said sum is not made within that time, your failure shall constitute an unconditional refusal to pay and a denial of liability.

Very truly yours,

George H. Cox, aka
George M. Cox

encl.

AFFIDAVIT OF H. T. RUSSELL

State of California,
County of Sacramento—ss.

H. T. Russell, being first duy sworn, deposes and says:

I am H. T. Russell and have personal knowledge of the facts herein set forth.

On 17 January 1954, I received a letter from Harry Bachtold, a copy of which is attached hereto

marked Exhibit "A" and made a part of this affidavit.

I had previously been notified of my appointment by the defendant as an appraiser. On 27 January 1954, I telephoned Harry Bachtold at Redding, California, at which time I asked him when we could get together and work out an appraisal of the Cox loss. Harry Bachtold informed me that the weather was very bad, and that he was more or less under the weather, and that he would let me know when we could get together. We discussed the appointment of an umpire, and Harry Bachtold said that he did not think this would be necessary and thought we could agree without an umpire. I informed him that I thought we should appoint an umpire.

I next heard from Harry Bachtold when he wrote me a letter on 23 February 1954, a copy of which is attached hereto marked Exhibit "B" and made a part of this affidavit. I responded to the letter of 23 February 1954 of Mr. Bachtold by my letter of 25 February 1954, a copy of which is attached hereto marked Exhibit "C" and made a part of this affidavit. Since the date of my letter of 25 February 1954, I have never heard from Mr. Bachtold with respect to the appraisement or any other matter pertaining to this loss.

Said letter dated 25 February 1954 was placed by me in the United States Mail, postage prepaid, and addressed to plaintiff at Box 311, Redding, California, which was the return address of the

said H. J. Bachtold indicated on the envelope containing his letter of 23 February 1954.

/s/ H. T. RUSSELL

Subscribed and sworn to before me this 4 day of October, 1954.

[Seal] /s/ S. Ferryman,

Notary Public in and for the County of Sacramento, State of California

EXHIBIT "A"

Howard T. Russell January 15, 1954
c/o C. J. Hopkinson & Company
1810 28th Street, Sacramento, California

In re: Cox vs. London & Lancashire Ins. Co.

Dear Sir:

Mr. George H. Cox of Redding, California advises that he is the holder of a policy of insurance issued by the London and Lancashire Insurance Ltd. of London, England, which said policy is numbered PCD 983103, and that the property covered by this policy was destroyed by fire on January 25, 1953.

He also advised under the terms of that policy that the Company chose to appoint appraisers, and that you were appointed the Company's appraiser.

Mr. Cox in turn appointed the writer his appraiser pursuant to the provisions of that policy.

Tomorrow I expect to examine the testimony given at the trial of the case, the proof of loss, a copy of which I have in my possession, and ascer-

tain the materials and costs in this locality as of January 25, 1953. Thereafter I will be prepared to proceed with our duties. I will be available, on any day of the week between Monday and Friday, inclusive, before 8 o'clock in the morning and after 5 o'clock p.m., or on any Saturday or Sunday at anytime. My address is 1740 Chestnut Street, Redding, Calif.; my telephone number is Redding 272W. Mr. Cox expressed the view that he would like to have the matter disposed of at an early date.

Trusting that you will arrange to meet me for the disposal of this matter immediately, I am

Yours very truly,

..........................

Harry Bachtold

EXHIBIT "B"

H. T. Russell February 23, 1954

1810 - 28th Street, Sacramento, California

Re: Cox vs. London & Lancashire Ins. Co.

Dear Sir:

Another relapse has put me back on the sick list, and it may be a few weeks until I get ahold of myself again.

I have not been pressed by anyone at this end, so there is no immediate urgency.

Thanks for your phone call.

Sincerely,

H. J. Bachtold

EXHIBIT "C"

Mr. H. J. Bachtold February 25, 1954
Box 311, Redding, California

Dear Mr. Bachtold:

Thank you for your letter of February 23.

I am sorry to learn of your illness and hope that you will soon be fully recovered.

Let me know when you are ready to proceed with the appraisal, and I will try to make arrangements to see you up there.

Very truly yours,

H. T. Russell

AFFIDAVIT OF GEORGE H. HAUERKEN

State of California,
City and County of San Francisco—ss.

George H. Hauerken, being first duly sworn, deposes and says:

I am George H. Hauerken and have personal knowledge of the facts herein set forth.

I am the George H. Hauerken who is a partner in the firm of Hauerken, St. Clair & Viadro and who is one of the counsel for the defendant in the above entitled proceeding and appear as an attorney of record for the defendant in the above entitled proceeding.

On 24 September 1954, I received in the ordinary course of mail a letter written by Leander W. Pitman, one of the attorneys for the plaintiff, addressed to the Honorable Albert F. Ross under

date of September 21, 1954, a photo copy of which, together with a photo copy of the face of the envelope in which said letter was received, is attached hereto marked Exhibit "A" and made a part of this affidavit.

On 24 September 1954, I received in the ordinary course of mail what purports to be a carbon copy of a letter written by the Honorable Albert F. Ross to said Leander W. Pitman, a photo copy of which, together with a photo copy of the face of the envelope in which said letter was received, is attached hereto marked Exhibit "B" and made a part of this affidavit.

/s/ GEORGE H. HAUERKEN

Subscribed and sworn to before me this 1st day of October, 1954.

[Seal] /s/ ENA QUETIN TUSSI,

Notary Public in and for the City and County of San Francisco, State of California.

EXHIBIT "A"

[Letterhead of Leander W. Pitman]

[Stamped] Received Sep 24, 1954 G. H. H.

Honorable Albert F. Ross — Sept. 21, 1954

Judge of the Superior Court

Redding, California

Re: Cox vs. London & Lancashire Insurance Co.
Federal District Court Case No. 7037

Dear Judge Ross:

The London & Lancashire Insurance Company,

Ltd. has invoked the provisions of its fire insurance policy No. PCD 983103 calling for an appraisal, and has demanded that an appraisal be had pursuant to the policy terms and conditions.

In this connection, it has selected Mr. Howard T. Russell of Sacramento as its appraiser.

Mr. George H. Cox, the insured under the above policy and whom we represent, has selected Mr. Harry J. Bachtold of Redding as his appraiser.

The above numbered policy provides as follows: "The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located."

Pursuant to the quoted provision of the policy in question, Mr. George H. Cox respectfully requests that you select an umpire so that the appraisal of the fire loss in question may be completed.

Thank you for your courtesy in this matter.

Very truly yours,

/s/ By Leander W. Pitman,

L. C. Smith and Leander W. Pitman, Attorneys for George H. Cox

cc: Mr. George H. Hauerken, Hauerken, St. Clair & Viadro, 235 Montgomery Street, San Francisco, California.

[Envelope]

Leander W. Pitman [Canceled Postage Stamp]
Attorney at Law, Anglo Bank Building
1320 Yuba Street, Redding, California

Mr. George H. Hauerken
Hauerken, St. Clair & Viadro
Attorneys at Law
535 Russ Building
235 Montgomery Street
San Francisco 4, California

EXHIBIT "B"

The Superior Court of the State of California
in and for the County of Shasta

Albert F. Ross Judge
Richard B. Eaton, Judge

[Stamped] Received Sep 24 1954 G. H. H.

Leander W. Pitman September 22, 1954
Attorney at Law
1320 Yuba Street, Redding, California

Re: Cox vs. London & Lancashire Insurance Co.
Federal District Court Case No. 7037

Dear Mr. Pitman:

Answering your letter of September 21, 1954, I will name W. N. Zachary, Realtor of Redding. I believe he would be entirely neutral in this matter and is a good appraiser.

Sincerely yours,

Albert F. Ross
Judge of the Superior Court

AFR/ns—cc: Mr. George H. Hauerken, Hauerken, St. Clair & Viadro, 235 Montgomery Street, San Francisco, California.

[Envelope]

Albert F. Ross [Canceled Postage Stamp]
Judge of the Superior Court
Shasta County, Redding, California

Hauerken, St. Clair & Viadro
235 Montgomery Street
San Francisco, California

Attn: Mr. George H. Hauerken

Affidavit of Service attached.

[Endorsed]: Filed October 25, 1954.

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[Title of District Court and Cause.]

## AFFIDAVIT OF GEORGE H. COX

State of California,
County of Sacramento—ss.

George H. Cox, being first duly sworn, on oath deposes and says:

That I am the plaintiff in the above entitled action and I was the insured under the policy of fire insurance which is the subject matter of the above entitled action. That my dwelling and furniture and all other contents thereof were totally destroyed by a fire which started at approximately 1:20 o'clock a.m. on the 25th day of January, 1953. In helping my wife, children and another resident of my house to escape from said burning dwelling, I was cut with glass which required medical attention. Immediately after I was treated, I called

Frank Plummer, insurance agent at Redding, from whom I procured the subject policy. I reported the fire loss to him and he advised me that the adjuster for the said insurance carrier was the General Adjustment Bureau, Inc. who maintained an office in Redding of which Mr. J. S. Rogers was in charge. Mr. Plummer volunteered to contact Mr. Rogers for me and Mr. Rogers then contacted me and we went to the scene of the fire at 10:00 a.m. in Mr. Rogers' car. During the course of said trip, I made a full disclosure of all facts and circumstances surrounding the fire and the losses thereby suffered and answered all questions that Mr. Rogers propounded. Thereafter, for three or four times or more, I contacted Mr. Rogers and Mr. Plummer for the purpose of them to procure blank proofs of loss and for their assistance in doing all things that were necessary under the said policy for me to do to effect the collection of my loss thereunder. It was not until the 16th of March, 1953, that Mr. Rogers advised me that he was ready to assist me in the preparation of the proofs of loss. Several days prior to March 16, 1953, Mr. Rogers had requested that I procure an inventory of all the personal property destroyed with the exception of the personal wardrobe of myself and family explaining to me that they had a lump sum allotment covering the loss of personal wardrobe and hence it was not necessary to furnish any detail therefor and pursuant to that request, I had dropped off, at Mr. Rogers' office several days prior to the 16th day of March, an inventory which he agreed

to forward to the insurance carrier with the proofs of loss.

On the morning of March 16, 1953, the nature and extent of my losses was fully discussed and I filled in the introductory part of the sworn statement on proof of loss, that is, all the portion thereof that appeared above the paragraph numbered 1. Mr. Rogers assumed the obligation of filling in the balance of the proof of loss which I assumed that their said insurance company's adjuster knew the requirements of said carrier in this regard. I have no information as to whether or not further writings were placed upon said proof of loss after I had executed and delivered the same, and if there has been, who made such writings is of course unknown to me, that at all times prior to the filing of said proof of loss, I willingly and promptly did everything that both Mr. Rogers and Mr. Plummer directed of me and at no time did I refuse to divulge or reveal any information requested.

Some several weeks later, but prior to April 30, 1953, Mr. John W. Smith, adjuster for the General Adjustment Bureau, Inc. from Sacramento, called on me at my residence and questioned me at great length relative to the fire and my losses at which time I fully cooperated and fully answered every question asked. He also interrogated me relative to my entire working history, with whom I worked, etc. and also delved into my personal life. Nothing further was heard until I received the General Adjustment Bureau's letters of April 29th and 30th, which are exhibits "B" and "C" respectively on the

affidavit of J. W. Smith heretofore filed in the above entitled matter by the defendant. I then saw Mr. Plummer and told him of the receipt of these letters and their respective contents and Mr. Plummer stated in effect that he was fearful that the company would not pay under the policy and these letters could be the foundation for their said refusal and further advised me to see a lawyer before I appeared for the sworn examination requested therein. I then employed L. C. Smith and Leander W. Pitman, and since that time have been represented by said attorneys.

That on the 11th day of June, 1953, I filed an action in the Superior Court of the State of California in and for the County of Shasta seeking to recover for my said losses. A copy of said complaint is attached hereto. (The subject insurance policy is attached to said complaint but in view of the fact that it is also attached as Exhibit "A" to the Complaint of the above entitled action, reference is hereby made to said document and made a part hereof for every purpose.) Thereafter, the defendant The London and Lancashire Insurance Company, Ltd., filed their answer, a copy of which is attached hereto marked Exhibit "B" and by reference made a part hereof; however, reference is hereby made to Paragraph V therein wherein said defendant insurance carrier denied all liability, and further, to Paragraph II wherein appears affirmative allegations relative solely to alleged defects in the proof of loss and to the alleged failure of plaintiff to submit to examination under oath.

That said case came to trial on November 3 and 4, 1953, at which time he was called as a witness and after being first duly sworn testified fully as to the origin of the fire, the nature of the losses, cost price of the losses and market value of the losses and the nature of items lost, which covered the full subject matter that any other examination under oath would cover. At the close of plaintiff's testimony, the court expressed itself as of the opinion that this plaintiff had a substantial sum of money due and owing him under the terms of the policy, that there was a grave question in his mind as to whether or not the request of the insurance company demanding the insured to submit to an additional examination under oath might under the law be said to have been fully complied with and for that reason of thought that the path of litigation might be hazardous. The counsel for plaintiff replied that if the Court was of that opinion, that so far as the plaintiff was concerned, he would raise no objection to the Court granting a non-suit on its own motion, providing that it was without prejudice and the Court thereupon did so. (See Exhibit "C".)

After the dismissal of said action (November 4, 1953) I offered to submit to oral examination by my letter to the London & Lancashire Insurance Company, Ltd., dated December 21, 1953 (see Exhibit "A" attached to affidavit of A. J. Stocklmier) and on January 13, 1954, I submitted a supplemental proof of loss containing all the detail requested which for all material purposes was a duplication of the information heretofore presented and by said supple-

mental proof of loss increased the loss to $13,000.00.

Up to and including December 23, 1953, neither of the parties to said insurance policy invoked the provision thereof calling for an appraisal. On the 6th day of January, 1954, I received a registered letter with return receipt requested from the London & Lancashire Insurance Company, Ltd., addressed to me at Box 704, Redding, and dated December 23, 1953. In view of the fact that said Box 704 is not my box, the same could not be delivered to me until I was located and when located I immediately called therefor. By said letter of December 23, 1953, the insurance carrier for the first time purported to invoke the provision of the insurance policy relative to an appraisal and invoked the same approximately 11 months and 19 days after the fire and before the requested sworn examination was held. By my letter to the London & Lancashire Insurance Company, Ltd., of January 13, 1954 (see Exhibit "C" attached to Stocklmier's affidavit) I named H. J. Bachtold as an appraiser, subject, however, to the following condition:

"I demand that you forthwith and in any event on or before January 22, 1954, at the hour of 4:00 o'clock p.m. of said day pay to me the sum of $13,000.00 for the loss sustained by fire covered by policy No. PCD 983103 and if payment of said sum is not made within that time, your failure shall constitute an unconditional refusal to pay and a denial of liability".

To said letter I received no reply. Since said loss was not paid by 4:00 o'clock p.m. on January 22,

1954, and in view of the fact that under the provisions of the policy, the time to commence a suit thereon expired unless commenced within twelve months next after the inception of the loss (and January 22 was the last day an action could be filed within said twelve-month period), I directed my attorney to file an action in the Superior Court in and for the County of Shasta on said last day, to-wit, January 22, immediately following 4:00 o'clock p.m. of said day, which said action was thereafter removed to the above entitled Court. That although Mr. Bachtold requested a hearing and/or meeting for the ascertaining of appraisals for the week commencing on Monday, January 18 through Friday, January 22, 1954, by his letter dated January 15, 1954, to Howard T. Russell, the appraiser appointed by the insurance carrier, said Howard T. Russell did not seek to obtain a date for such hearing or meeting until January 27, 1954 (after the time to commence action had elapsed) when he telephoned Mr. Bachtold asking that a date be set.

/s/ GEORGE H. COX

Subscribed and sworn to before me this 18th day of November, 1954.

[Seal] /s/ MARION FRITZ,

Notary Public in and for the County of Sacramento, State of California.

Affidavit of Service by Mail attached.

EXHIBIT "A"

In the Superior Court of the State of California in and for the County of Shasta

No. 19286

George H. Cox, aka George M. Cox, Plaintiff, vs.
The London and Lancashire Insurance Company, Ltd., a corporation, Defendant.

COMPLAINT

(Breach of Contract)

Comes now the plaintiff, above named, and for cause of action against the defendant, above named, alleges as follows:

I.

That the contract on which this cause of action is based is in writing.

II.

That at all times herein mentioned, the defendant, The London and Lancashire Insurance Company, Ltd., was, and now is, a foreign corporation, organized and existing under the laws of the Kingdom of Great Britain and Ireland, and authorized to carry on the business of fire insurance. That said defendant was at said times authorized to carry on the business of fire insurance in the State of California, by and through resident agents, and that one Frank B. Plummer was its duly authorized agent at Redding, California.

III.

That on the 19th day of December, 1952, and to and including the date of the fire hereinafter men-

tioned, the plaintiff was the owner of a dwelling house, and the furniture therein, at or near the Town of Redding, County of Shasta, State of California.

IV.

That in consideration of the premium of One Hundred Sixty-two and 50/100 ($162.50) Dollars paid to it by the plaintiff, the defendant, by its policy of insurance signed by one of its managers in the City of San Francisco, California, acting under power of attorney, and countersigned by its general agent, the De Veuve & Company, at San Francisco, California, under date of December 24, 1952, and delivered to the plaintiff in the Town of Redding, California, a copy of which policy of insurance is hereto annexed, marked "Exhibit "A", and made a part of this complaint by reference, insured the plaintiff against loss or damage by fire to the amount of Thirteen Thousand and no/100 ($13,000.00) Dollars on said property, from the 19th day of December, 1952, at 12 o'clock noon until the 19th day of December, 1955, at 12 o'clock noon.

V.

That the plaintiff has duly performed all the conditions on his part to be performed, and on the 25th day of January, 1953, said dwelling and furniture were greatly damaged by fire. That said fire did not occur from any of the causes excepted in said policy.

VI.

That the plaintiff's loss thereby was Fourteen Thousand Six Hundred Seventy and 40/100 ($14,-670.40) Dollars.

VII.

That the plaintiff immediately thereafter, on or about the 26th day of January, 1953, notified the defendant of said loss, and on or about the 20th day of March, 1953, and more than sixty days prior to the commencement of this action, furnished the defendant with due proof of said loss.

VIII.

That no part of said loss has been paid, and the sum of $13,000.00 is now due thereon from the defendant to the plaintiff, to plaintiff's damage in the sum of $13,000.00.

IX.

That at all times herein mentioned the dwelling house owned by the plaintiff, as aforesaid, was occupied for dwelling house purposes with the aforesaid furniture therein.

Wherefore, plaintiff prays judgment against the defendant, in the sum of $13,000.00 with interest thereon at the rate of seven per cent per annum from March 20, 1953, to and including date of judgment, together with his costs of suit incurred herein.

L. C. SMITH and
LEANDER W. PITMAN,
/s/ L. C. SMITH - LEANDER W. PITMAN,

Attorneys for Plaintiff

Duly Verified.

EXHIBIT "B"

[Title of Superior Court and Cause No. 19286.]

ANSWER

Comes now the defendant and answers the Complaint on file herein as follows:

I.

That defendant has no information or belief sufficient to enable it to answer the allegations of Paragraph III of said Complaint, and placing its denial upon that ground, denies each and every allegation therein contained.

II.

Answering the allegations of Paragraph V, defendant denies each and every allegation therein contained.

In this behalf defendant further alleges that upon demand plaintiff failed to render to defendant within sixty (60) days after said loss a written proof of loss signed and sworn to by the insured stating the knowledge and belief of the insured as to the following: The time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, and all encumbrances thereon together with verified plans and specifications of the building claimed to have been destroyed or damaged; and that upon further demand plaintiff failed and refused to submit to examination under oath.

III.

Answering the allegations of Paragraph VI, defendant denies each and every allegation therein contained.

IV.

Answering the allegations of Paragraph VII, defendant denies that it was furnished with due proof of said loss under the terms and conditions of said policy of fire insurance.

V.

Answering the allegations of Paragraph VIII, defendant denies that the sum of Thirteen Thousand Dollars ($13,000.00), or any sum whatsoever, is now due plaintiff from defendant and that plaintiff has been damaged in the sum of Thirteen Thousand Dollars ($13,000.00).

VI.

Answering the allegations of Paragraph IX, defendant has no information or belief sufficient to enable it to answer the allegation of Paragraph IX regarding plaintiff's ownership and placing its denial upon that ground, denies said dwelling house was owned by plaintiff as therein alleged.

Wherefore, defendant prays judgment that plaintiff take nothing by his Complaint and that it be dismissed with its costs of suit herein incurred.

KENNEDY & CALDWELL,
/s/ By LAURENCE J. KENNEDY, JR.,
Attorneys for Defendant

Duly Verified.

EXHIBIT "C"

[Title of Superior Court and Cause No. 19286]

## JUDGMENT OF NON-SUIT

The above-entitled cause coming on regularly for trial on the 3rd day of November, 1953, L. C. Smith and Leander W. Pitman appearing as counsel for plaintiff and George Hauerkin, of the law firm of Hauerkin, St. Clair and Viadro, and Laurence J. Kennedy, Jr., of the law firm of Kennedy and Caldwell, appearing as counsel for defendant, a jury was regularly impanelled and sworn to try the same. The opening statement and witnesses and a portion of the proof on the part of the plaintiff having been heard, together with argument thereon, and the Court having duly considered the same and the sufficiency of plaintiff's case, whereupon, for insufficiency of plaintiff's proof, the Court made the following order upon its own motion and directed that judgment be entered accordingly.

Therefore, It Is Ordered and Adjudged that the action be dismissed without prejudice to the plaintiff and that defendant recover of the plaintiff his costs of suit, amounting to the sum of Twenty-Eight and 75/100 Dollars ($28.75).

Dated this............day of November, 1953.

.................................................,
Judge of the Superior Court

[Endorsed]: Filed November 19, 1954.

[Title of District Court and Cause.]

## NOTICE OF MOTION

To the above named Defendants and to their Attorneys:

You and Each of You will please take notice that on the 4th day of April, 1955, at the hour of 10:00 o'clock a.m., or as soon thereafter as counsel may be heard, the above named plaintiff will move the court for an order granting him leave to file his supplemental complaint. A copy of such proposed supplemental complaint is hereto attached and marked Exhibit "A" and by reference made a part hereof.

This motion will be made pursuant to Rule 15(d) of the Federal Rules of Civil Procedure and upon all of the papers and documents on file in the above entitled proceeding in the above entitled court.

Dated: March 29, 1955.

/s/ L. C. SMITH,
/s/ DEVLIN, DIEPENBROCK & WULFF,
/s/ LEANDER W. PITMAN,
Attorneys for Plaintiff

## EXHIBIT "A"

## SUPPLEMENTAL COMPLAINT

With leave of Court first had and obtained, now comes the above named plaintiff and files this his supplemental complaint setting forth the following

transactions or occurrences which have happened since the date of the complaint, to-wit:

I.

That by letter dated December 23, 1953, which was received by the above named plaintiff on January 6, 1954, the above named defendants invoked the provisions of the policy of fire insurance (referred to in the complaint of plaintiff) calling for an appraisal and thereby demanding that an appraisal be had pursuant to the policy's terms and conditions and, further, thereby selected Howard T. Russell, 1810 - 28th Street, Sacramento, California, as defendants' appraiser.

II.

That on or about the 13th day of January, 1954, the above named plaintiff objected to the appointment of Howard T. Russell as a distinterested appraiser and without waiving such objections said plaintiff appointed Harry J. Bachtold, 1740 Chestnut Street, Redding, California, as a competent and disinterested appraiser which appointment was subject to the condition that the defendants forthwith or in any event on or before January 22, 1954, at the hour of 4:00 o'clock p.m. of said day pay to the plaintiff the sum of Thirteen Thousand Dollars ($13,000.00) for the loss sustained by fire covered by the subject policy and if payment of said sum was not made within the time, defendants' failure shall constitute an unconditional refusal to pay and a denial of liability.

III.

That since the parties failed for fifteen (15) days from and after the date mentioned in said preceding paragraph to agree upon a disinterested umpire, Albert F. Ross, Judge of the Superior Court of the State of California, in and for the County of Shasta, did on or about the 22nd day of September, 1954, select W. N. Zachary as such umpire.

IV.

That on or about the 18th day of December, 1954, said W. N. Zachary notified the above named plaintiff and the above named defendants of the time and place of the hearing of the "Cox Appraisal" under the provisions of the aforesaid policy, to-wit, the 4th day of January, 1955, at the hour of 10:00 o'clock a.m. in the office of W. N. Zachary, 1410 Sacramento Street, Redding, California, and that at said time and place said two (2) appraisers and said umpire met and heard testimony and also made physical examination and inspection of the site of the destroyed dwelling and such ruins as remained and after such proceedings and evidence adduced, Robert L. Nusbaum appraised the loss of the house and garage in the total sum of Eight Thousand Dollars ($8,000.00) and Harry J. Bachtold appraised such loss in the sum of Ten Thousand Two Hundred Dollars ($10,200.00) and appraiser Robert L. Nusbaum made no appraisal of the value of the personal property lost in such fire but appraiser Harry J. Bachtold appraised the loss of said personal property in the sum of Five Thousand Two

Hundred Five Dollars ($5,205.00) and that on or about the 1st day of March, 1955, appraiser Harry J. Bachtold filed with said umpire his amended appraisal wherein he appraised the amount of the loss of said house and garage in the total sum of Nine Thousand Five Hundred Dollars ($9,500.00) and leaving his appraisal as to the loss of said personal property in the sum of Five Thousand Two Hundred Five Dollars ($5,205.00).

V.

That since the appraisal of the aforesaid appraiser Robert L. Nusbaum and appraiser Harry J. Bachtold ended in disagreement their said differences were submitted to umpire W. N. Zachary in accordance with the provisions of the aforesaid fire insurance policy and that thereafter on or about the 10th day of March, 1955, said umpire W. N. Zachary made his award in writing wherein and whereby the actual cash value of the actual cash loss of the dwelling house and garage was fixed in the sum of Nine Thousand Five Hundred Dollars ($9,500.00) and the actual cash value of the actual cash loss of each item of the personal property likewise destroyed in said fire was appraised, having a total value of Five Thousand Two Hundred Five Dollars ($5,205.00) and a copy of said award or appraisement is hereto attached and marked Exhibit "A" and by reference made a part hereof for every purpose; that on or about the 29th day of March, 1955, the said award or appraisement was filed with the defendant English-American Underwriters.

Wherefore, plaintiff prays that in addition to the remedies and relief prayed for in his original complaint that this Court adjudge and decree that said award and/or appraisement of appraiser Harry J. Bachtold and umpire W. N. Zachary shall be determinative of the amount of the actual cash value or the actual cash loss of the destroyed properties and that judgment be entered in favor of the plaintiff and against the defendants for the amount thereof, together with interest and costs of suit herein incurred, and for such other relief as the Court may deem meet and proper.

Dated: April........., 1955.

L. C. SMITH,
LEANDER W. PITMAN,
DEVLIN, DIEPENBROCK & WULFF,
Attorneys for Plaintiff

EXHIBIT "A"

AWARD OR APPRAISEMENT

We, the undersigned, Harry J. Bachtold, appraiser appointed by George H. Cox, and W. N. Zachary, umpire appointed by the Honorable Albert F. Ross, Judge of the Superior Court of the State of California, in and for the County of Shasta, under and by virtue of the provisions of a certain fire insurance policy No. PCD 983103 issued by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., to George M. Cox under date of December

24, 1952, which said provision of said fire insurance policy reads as follows:

> "In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

do under the authority conferred upon us by the aforesaid fire insurance policy, hereby report, file, adjudge and appraise as follows:

1. That on or about the 18th day of December, 1954, we notified George H. Cox and his attorney, L. C. Smith, and the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., by and through its attor-

neys, George H. Hauerken and Laurence J. Kennedy, Jr., that the date and time of the hearing of the Cox appraisal, under the provisions of the aforesaid policy, would be held on January 4, 1955, at the hour of 10:00 o'clock, a.m., in the office of W. N. Zachary, at 1410 Sacramento Street, Redding, California, when and where we would meet with appraiser Robert L. Nusbaum, heretofore appointed by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., as its appraiser under the aforesaid provision of the aforesaid fire insurance policy, and appraise the property insured against risk of loss by fire under the provisions of the above numbered fire insurance policy, and render a decision and award or awards as to its appraised value.

2. That in pursuance of said notice we met with appraiser Robert L. Nusbaum at the time and place mentioned in said notice to take evidence upon the dispute between George H. Cox and the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd., as to the actual cash value or the amount of loss incurred by said George H. Cox as a result of a fire occurring on or about January 25, 1953; that on said 4th day of January, 1955, we met and heard the testimony of George H. Cox and also made a physical examination and inspection of the remains of the dwelling and its contents insured against loss by fire under the provisions of the aforesaid policy; that we have faithfully and fairly heard, examined and appraised the cost and value of the property insured

under the provisions of the aforesaid policy according to the principles of equity and justice; that we find from all of the evidence that the hereinafter described house and garage annexed thereto was apprised and its value was determined by appraiser Robert L. Nusbaum to be in the total sum of Eight Thousand and no/100 ($8,000.00) Dollars and by appraiser Harry J. Bachtold in the sum of Ten Thousand Two Hundred and no/100 ($10,200.00) Dollars; that appraiser Robert L. Nusbaum has made no appraisal of the value of the personal property hereinafter described; and that appraiser Harry J. Bachtold has appraised and determined the value of said personal property to be in the sum of Five Thousand Two Hundred Five and no/100 ($5,205.00) Dollars.

3. That thereafter and on or about the 1st day of March, 1955, appraiser Harry J. Bachtold amended his aforesaid appraisal of the value of the hereinafter described house and garage to read in the sum of Nine Thousand Five Hundred and no/100 ($9,500.00) Dollars, and leaving his appraisal of the value of the hereinafter described personal property at the sum of Five Thousand Two Hundred Five and No/100 ($5,205.00) Dollars.

4. That whereas the aforesaid appraisal by the aforesaid appraisers, Robert L. Nusbaum and Harry J. Bachtold, ended in disagreement; and whereas said appraisers have heretofore submitted their differences to umpire W. N. Zachary in accordance with the provisions of the aforesaid fire insurance policy; and whereas the said umpire has appraised

the hereinafter described house and garage annexed thereto and determined its value to be in the total sum of Nine Thousand Five Hundred and no/100 ($9,500.00) Dollars, and has also appraised the hereinafter described items of personal property and determined their value to be in the total sum of Five Thousand Two Hundred Five and no/100 ($5,-205.00) Dollars;

Now, Therefore, we, the undersigned appraiser and umpire, hereby appraise and determine the actual cash value and the actual cash loss of the hereinafter described real and personal property as follows:

* * * * *

We, the undersigned appraiser and umpire, do hereby certify the above to be a full and fair appraisement of the actual cash value and the actual cash loss of the hereinabove appraised property insured under the provisions of California Standard Form Fire Insurance Policy No. PCD 983103 issued by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd.

In witness whereof we have hereunto subscribed our names as appraiser and umpire respectively this 10th day of March, 1955.

H. J. BACHTOLD, also known as
Harry J. Bachtold, Appraiser
W. N. ZACHARY, Umpire

State of California,
County of Shasta—ss.

On March 14, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Harry J. Bachtold and W. N. Zachary, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

Witness my hand and official seal.

ADELE MARIE ZACHARY,
Notary Public in and for said County and State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1955.

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[Title of District Court and Cause.]

## MEMORANDUM AND ORDER

Plaintiff originally brought this action in the Superior Court of the State of California, in and for the County of Shasta, on a fire insurance policy seeking to recover the loss, which he alleges he sustained as the result of a fire. Defendant had the case removed to this Court on the jurisdictional basis of diversity of citizenship. Defendant moved this Court for a summary judgment. Argument on this motion was heard by this Court in due course, and the motion was submitted for decision after counsel, at the Court's request, filed memoranda in support of their positions. Thereafter, on a date subsequent to

the hereinafter described house and garage annexed thereto and determined its value to be in the total sum of Nine Thousand Five Hundred and no/100 ($9,500.00) Dollars, and has also appraised the hereinafter described items of personal property and determined their value to be in the total sum of Five Thousand Two Hundred Five and no/100 ($5,205.00) Dollars;

Now, Therefore, we, the undersigned appraiser and umpire, hereby appraise and determine the actual cash value and the actual cash loss of the hereinafter described real and personal property as follows:

* * * * *

We, the undersigned appraiser and umpire, do hereby certify the above to be a full and fair appraisement of the actual cash value and the actual cash loss of the hereinabove appraised property insured under the provisions of California Standard Form Fire Insurance Policy No. PCD 983103 issued by the English-American Underwriters, agency of The London and Lancashire Insurance Company, Ltd.

In witness whereof we have hereunto subscribed our names as appraiser and umpire respectively this 10th day of March, 1955.

H. J. BACHTOLD, also known as
Harry J. Bachtold, Appraiser
W. N. ZACHARY, Umpire

State of California,
County of Shasta—ss.

On March 14, 1955, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Harry J. Bachtold and W. N. Zachary, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

Witness my hand and official seal.

ADELE MARIE ZACHARY,
Notary Public in and for said County and State of California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 29, 1955.

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[Title of District Court and Cause.]

## MEMORANDUM AND ORDER

Plaintiff originally brought this action in the Superior Court of the State of California, in and for the County of Shasta, on a fire insurance policy seeking to recover the loss, which he alleges he sustained as the result of a fire. Defendant had the case removed to this Court on the jurisdictional basis of diversity of citizenship. Defendant moved this Court for a summary judgment. Argument on this motion was heard by this Court in due course, and the motion was submitted for decision after counsel, at the Court's request, filed memoranda in support of their positions. Thereafter, on a date subsequent to

the submission of the motion for summary judgment, but before a decision had been rendered, plaintiff moved this Court for leave to file a supplemental complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure. This Court ordered this latter motion submitted, and announced that it would consider and decide both motions at the same time.

The motion for summary judgment, which was made by the defendant, is predicated on the single proposition that there had not been arbitration as to the dispute between the parties as to the actual cash value or the amount of loss, and that such an arbitration by the terms of the insurance policy is a condition precedent to bringing suit on the policy. The proposed supplemental complaint is intended to show that since the filing of the original complaint in this action arbitration has in fact been completed in the manner prescribed by the insurance policy.

Preliminarily, it is to be noted that this Court's decision as to the motion for summary judgment will be determinative of the fate of plaintiff's motion seeking leave to file a supplemental complaint in this case. This is for the reason that even though the granting or refusing of leave to file a supplemental pleading rests in the sound discretion of the trial court (Schuckman vs. Rubenstein, 164 F.2d 952, and United States vs. Caulk Co., 114 F. Supp. 939), a supplemental complaint based upon facts which occurred after the filing of the original complaint cannot be used to cure a complaint which

failed initially to state a cause of action (Bonner vs. Elizabeth Arden, Inc., 177 F.2d 703, and Berssenbrugge vs. Luce Mfg. Co., 30 F Supp. 101). Plaintiff's right to recover must be predicated upon facts in existence at the time the complaint was filed (Bowles vs. Senderowitz, 65 F. Supp. 548, and Porter vs. Senderowitz, 158 F.2d 435). It must therefore follow that if in this case no cause of action existed at the time the initial complaint was filed, for the reason that a condition precedent to bringing suit had not been satisfied, the supplemental complaint may not be filed to state a cause of action based upon facts occurring subsequent to the filing of the original complaint.

The sole question for this Court to determine in order to reach a decision on the motion for a summary judgment is whether or not arbitration was a condition precedent to bringing this action. The provisions of the California Standard Form Fire Insurance Policy (California Insurance Code, Sec. 2071), which are pertinent to the question before the Court, read as follows:

"Appraisal

"In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand.

"Suit

"No suit or action on this policy for the recovery

of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 12 months next after inception of the loss."

It has long been the law in California that policy provisions such as those set forth above create a condition precedent to the bringing of a suit on an insurance policy when the amount of value of the loss is in dispute (Old Saucelito Land and Dry Dock Co. vs. The Commercial Union Assurance Co., 66 Cal. 253, and Adams vs. South British and National Fire and Marine Insurance Companies, 70 Cal. 198). However, arbitration exists as a condition precedent only when there is a failure of the parties to agree as to the amount or value of the loss, and if the insurance company denies liability on the policy, there is a waiver of arbitration as a condition precedent, since there is then not a dispute as to the amount of the loss, but rather a dispute as to the liability of the company (Farnum vs. Phoenix Ins. Co., 83 Cal. 246; Jacobs vs. The Farmers' Mutual Fire Ins. Co., 5 Cal. App. 2d 1; and Bass vs. Farmers' Mutual Protective Fire Ins. Co., 21 Cal. App. 2d 21). In order for the denial of liability to waive the arbitration condition precedent, and give a right to an immediate cause of action, it must be an unconditional denial, that is, it must be a denial based on something other than a dispute as to the amount of the loss or an objection to the proofs of loss (See: Farnum vs. Phoenix Ins. Co., supra; Jacobs vs. The Farmers' Mutual Fire Ins.

Co., supra; Bass vs. Farmers' Mutual Protective Fire Ins. Co., supra; and 3 ALR 2d 409). Some examples of denials of liability by insurance companies, which have been held to waive arbitration as a condition precedent, are: (1) a denial of liability on the basis that the policy did not exist as it had been cancelled two months before the loss (Farnum vs. Phoenix Ins. Co., supra); (2) a denial of liability on the basis that the policy had been rendered void by the fraudulent representations of the insured (Jacobs vs. The Farmers' Mutual Fire Ins. Co., supra); and (3) a denial of liability on the basis that the policy was void in that the insured made misstatements of fact in his application for fire insurance (Bass vs. Farmers' Mutual Protective Fire Ins. Co., supra). In the above examples, the insurance company did not question the amount or the proof of loss, but rather their complete liability under the policy. The American rule, as it is aptly set forth in 3 ALR 2d 409, is "that if the insurance company takes a stand of unconditional or total denial of any liability on the policy itself, the insured may maintain an action thereon notwithstanding there has been no such determination of loss or damage by third persons as required by the 'appraisement' or limited 'arbitration' clause." To summarize on this point, it may be properly said that the law is that an arbitration clause is a condition precedent to bringing suit when the amount of the loss is in dispute, except in those cases where there is an unconditional denial of liability by the insurance company.

In order to get the course of events leading up to this action in proper perspective, it will be helpful to set forth these events in their chronological order. These events occurred in the following sequence:

January 25, 1953. The fire occurred.

January 26, 1953. The plaintiff notified the defendant's agents of the fire.

March 20, 1953. Preliminary proof of loss was furnished to the defendant on or about this date.

April 29, 1953. John W. Smith, the defendant's adjusting representative, requested an examination of the plaintiff under oath on May 7, 1953, as provided for in the policy.[1]

April 30, 1953. Mr. Smith again wrote to the plaintiff informing him that the preliminary proof of loss was insufficient. At this time it was stated in the letter to the plaintiff that defendant was neither denying or admitting liability; admitting the amount of the loss; nor waiving any of the conditions of the policy.

June 11, 1953. Action was filed by the plaintiff against the defendant in the Superior Court of the State of California in and for the County of Shasta.

July 17, 1953. Defendant filed an answer in the case filed by plaintiff denying liability on the policy.

November 3-4, 1953. Action was tried in the Superior Court of the State of California in and for the County of Shasta, and on the latter day a non-

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[1] The plaintiff refused to submit to an examination under oath claiming that he had already been examined.

suit was granted on the ground that the plaintiff had failed to submit to an examination under oath as required by the terms of the policy.

December 21, 1953. Plaintiff offered to appear for examination under oath.

December 23, 1953. Defendant wrote to the plaintiff and invoked the appraisal provisions of the insurance policy, and in this letter defendant appointed its appraiser.

January 7, 1953. Plaintiff was examined under oath in accordance with his offer of December 21, 1953.

January 13, 1953. A supplemental proof of loss was furnished to the defendant at the defendant's request.

January 13, 1954. Plaintiff advised the defendant that he had not received defendant's letter invoking the appraisal provisions of the policy until January 6, 1954, as it was incorrectly addressed,[2] and at this same time, plaintiff appointed his appraiser subject to the condition that liability be admitted by the defendant, or that the loss be paid on or before January 22, 1954, the last day on which plaintiff could file suit to recover his losses without being barred by the terms of the policy.

January 22, 1954. Plaintiff filed this action in the Superior Court of the State of California in and for the County of Shasta.

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[2] Defendant asserts that the address used on its letter of December 23rd was the address provided to defendant by plaintiff.

March 9, 1954. Defendant had this action removed to this Court.

There is no issue in this case as to whether arbitration was completed prior to the filing of the initial complaint since both parties freely admit that while appraisal proceedings had been commenced, the proceedings had not been completed prior to the filing of the complaint by plaintiff.

In opposition to the motion for summary judgment the plaintiff contends: (1) that submission to arbitration was not a condition precedent to bringing suit in this case, as there was no dispute as to the amount of loss in that the insurance company had denied liability on the policy; and (2) that defendant waived its right to raise the condition precedent of arbitration as a defense by its failure to demand an appraisal until such a late date that it could not be completed before the expiration of the twelve-month period in which suit was required to be brought by the terms of the policy, and for the further reason that the defendant did not raise this defense until after the expiration of the twelve-month period.

Plaintiff's first contention, namely, that there was no dispute as to the amount of the loss in that there was a denial of liability, is based primarily on the argument that the insurance company denied liability on the policy in their answer to the complaint originally filed by plaintiff in the Superior Court on June 11, 1953, and that liability was denied in the answer to the complaint now before this Court, which complaint was filed in the Su-

perior Court on January 22, 1954. Plaintiff has not cited any case authority in support of his position that a denial of liability in an answer to a complaint constitutes a denial such as would remove the arbitration condition as a precedent to the bringing of a suit on the policy. Furthermore, there does not appear to be any California authority on this point, but available case authority from other jurisdictions is contrary to plaintiff's contention. In 3 ALR 2d 416, the authorities there cited hold that a denial of liability by an insurance company, which is raised for the first time in an answer to a complaint, does not constitute a waiver of the condition precedent. None of the cases there cited deal with the precise situation where there was an answer by an insurer to a complaint in a prior suit in which a nonsuit was granted, but there is nothing about this facet of the situation which would seem to call for or justify the application of any different rule from that just cited.

Plaintiff also argues there was no condition precedent as the defendant did not admit liability, and thus the amount of loss was not the only issue in dispute. From the cases which have already been cited in this memorandum it is apparent that there must be some actual and affirmative act of denial of liability before there can be a waiver of a condition precedent, such as is involved in this case. The mere failure to admit liability is not sufficient.

There is nothing in the record which indicates that there was the required denial of liability on the part of the defendant in this case. To the contrary,

the defendant made it clear in its letter of April 30, 1953, to the plaintiff, that it was not denying or admitting liability, and that it was not waiving any of the conditions of the policy. By this same letter it was also made clear that the defendant was not satisfied with the plaintiff's proof of loss. Therefore, plantiff's first contention in opposition to the motion for summary judgment is without merit.

Plaintiff's second contention in opposition to the motion for a summary judgment, namely, that defendent waived its right to raise the defense of arbitration as a condition precedent, is likewise without merit. Both parties to this action accuse the other of dilatory tactics. Viewed from an unbiased standpoint, the conduct of neither party is exactly exemplary, but litigation does not turn on vituperation, so suffice it to here say that plaintiff's main troubles spring from his failure to cooperate with the company by promptly complying with the terms of the contract, which he entered into with the defendant. Plaintiff asserts that he was prejudiced by defendant's tardy demand for appraisal proceedings in that such proceedings could not be completed within the period fixed under the terms of the policy for the bringing of a suit on the policy. Under the terms of the policy either party could demand the appraisal proceedings. However, the plaintiff did not do so, even though he should have known from the rejection of his proof of loss (for the reason that it was insufficient) that the amount of loss was in fact in dispute. Furthermore, plaintiff did not submit a supplemental proof of loss

until January 13, 1954, some eight months after his original proof of loss was rejected by the defendant. There is no provision in the policy which obligates either the company or the insured to demand an appraisal before a time certain, and the company could not be reasonably expected to demand an appraisal until the insured had complied with the terms of the policy, which would provide the company with the data from which the company could determine whether an appraisal would be necessary.

Plaintiff argues that there was no condition precedent of arbitration prior to the insurer's demand for appraisal. What he is actually saying is that the demand for appraisal proceedings is a condition precedent to the condition precedent of arbitration. The facts in this particular case answer plaintiff's argument on this point, for even if a demand for appraisal were necessary to invoke the condition precedent of arbitration, the plaintiff cannot avoid the requirement of this condition precedent, since a demand for appraisal was in fact made by the defendant.

Plaintiff has cited Bollinger vs. National Fire Ins. Co., 25 Cal. 2d 399, in support of his contention that the defendant, by raising the defense of the condition precedent for the first time after the limitation on the bringing of a further action had run, waived the right to raise the defense. The Bollinger case involved a situation where the complaint had been filed after the statute of limitations had run. The Supreme Court of the State of California held the action was permissible, as under the

circumstances the statute of limitations had been suspended or tolled. The circumstances leading to this result were: (1) a prior suit by the plaintiff had been commenced within four months of the fire; (2) the insurance company had requested continuances by which it had delayed the trial of the case; (3) after the time for bringing suit had expired, the insurance company raised, for the first time, the defense that the suit had been premature; and (4) a nonsuit had been granted. The court held that the prior suit had not been premature and that the defendant by causing the delay, and waiting for almost one year to raise the defense that the suit was premature, had waived its right to that defense, and therefore, the statute of limitations was suspended as to the filing of a new complaint.

From a factual standpoint, the Bollinger case is entirely distinguishable from the case now before the Court. In the Bollinger case the insurance company had the opportunity to raise the technical defense that the suit was premature for many months before the expiration of the time within which suit had to be brought. It was only through affirmative acts of the insurance company, namely, the requesting of continuances that the time for bringing suit expired before the insurance company first raised the defense, which, if it had been properly and timely raised, and remained uncured, would have defeated a hearing on the merits. In the case at bar, it is the insured who is primarily, if in fact not entirely, responsible for the delays, which grew out of his conduct in failing to comply with the patent

terms of the policy. Furthermore, and perhaps of more importance, the defendant, in the case at bar, did not have the opportunity to raise the defense of the condition precedent for a period of approximately one year prior to the date on which the right to commence the suit expired, as was the situation in the Bollinger case. The situation is entirely different in the instant case, since the company in fact had no opportunity to raise the defense prior to the expiration of the time for the bringing of the suit; the complaint having not been filed by plaintiff until the last possible day before the expiration of the twelve-month period within which the suit could be filed. If, as plaintiff contends, there was no arbitration condition precedent until a demand for appraisal had been made, the defendant could not have raised the defense in the prior action, which action resulted in a nonsuit, as there was no condition precedent of arbitration in existence at that time. Even if arbitration were a condition precedent at the time of the prior suit, a defendant is not required to exert all his defenses at one time, and the defendant is not responsible for the delay that resulted from that trial. The delay in raising the defense of the condition precedent until after the expiration of the time for bringing suit cannot under the facts in this case be attributed to the defendant.

To summarize, it can be fairly said that under the facts in this case, arbitration was a condition precedent to the bringing of the suit, as the amount of the loss was obviously in dispute. There was

not a sufficient denial of liability such as would constitute a waiver of this condition precedent, and there was not a waiver of this condition precedent by the raising of the defense of a condition precedent for the first time, after the period within which the suit might be brought, had run. Under the facts of this case and the law applicable thereto, defendant's motion for a summary judgment must be granted, and plaintiff's motion for leave to file a supplemental complaint must be denied.

It Is, Therefore, Ordered that defendant's motion for a summary judgment be granted, and that plaintiff's motion for leave to file a supplemental complaint be denied. Judgment will be entered in this action accordingly.

Dated: June 21, 1956.

/s/ SHERRILL HALBERT,
United States District Judge

[Endorsed]: Filed June 21, 1956.

In the United States District Court for the Northern District of California, Northern Division

No. 7037

GEORGE H. COX, also known as GEORGE M. COX, Plaintiff,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation, Defendants.

## SUMMARY JUDGMENT AND ORDER DENYING MOTION FOR LEAVE TO FILE A SUPPLEMENTAL COMPLAINT

The motion of the defendant for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure and the motion of the plaintiff for an order granting him leave to file his supplemental complaint pursuant to rule 15 of the Rules of Civil Procedure both having been presented, and the court being fully advised, the court finds that there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the Complaint prior to the filing of this action, and that the plaintiff did not submit to, and that there has been no appraisal pursuant to the terms of the policy of insurance, prior to the filing of this action, and that defendant is entitled to a summary judgment;

further, the court finds from the evidence before it that the motion for an order granting plaintiff leave to file a supplemental complaint should be denied.

It Is Therefore Ordered that the motion of the defendant, The London & Lancashire Insurance Company, Ltd., a corporation, (sued herein as English-American Underwriters and as The London & Lancashire Company, Ltd., a corporation) for a summary judgment be, and the same hereby is, granted that the plaintiff, George H. Cox, also known as George M. Cox, have and recover nothing by his complaint, and that the defendant, The London & Lancashire Insurance Company, Ltd., a corporation, recover its costs and charges in this behalf expended and have execution therefor.

It Is Further Ordered that the motion of the plaintiff, George H. Cox, also known as George M. Cox, for an order granting him leave to file his supplemental complaint be, and the same is hereby, denied.

Dated this 6th day of July, 1956.

/s/ SHERRILL HALBERT,
Judge of U. S. District Court

Affidavit of Service by Mail attached.

[Endorsed] Filed and Entered July 6, 1956.

[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that George H. Cox, also known as George M. Cox, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from summary judgment and order denying motion for leave to file supplemental complaint entered in this action on July 6, 1956.

Dated: August 1, 1956.

/s/ L. C. SMITH,
/s/ LEANDER W. PITMAN,
/s/ DEVLIN, DIEPENBROCK & WULFF,
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed August 1, 1956.

---

[Title of District Court and Cause.]

## BOND FOR COSTS ON APPEAL

We, the undersigned, jointly and severally acknowledge that we and our personal representatives are bound to pay to English-American Underwriters and The London & Lancashire Insurance Company, Ltd., a corporation, defendants, the sum of Two Hundred Fifty Dollars ($250.00).

The condition of this bond is that, whereas the plaintiff has appealed to the Court of Appeals for the Ninth Circuit by notice of appeal filed August

1, 1956, from the judgment of this court entered July 6, 1956, if the plaintiff shall pay all costs adjudged against him if the appeal is dismissed or the judgment affirmed or such costs as the appellate court may award if the judgment is modified, then this bond is to be void, but if the plaintiff fails to perform this condition, payment of the amount of this bond shall be due forthwith.

Dated: July 30, 1956.

/s/ GEORGE H. COX,
Plaintiff

/s/ S. B. MILISICH,
Surety

/s/ GEORGE L. FLEHARTY,
Surety

Notary Public Certificate attached.

[Endorsed]: Filed August 1, 1956.

---

[Title of District Court and Cause.]

## APPELLANT'S STATEMENT OF POINTS

The following is a concise statement of the points upon which appellant intends to rely on the appeal in the above entitled matter:

I.

That the Court committed prejudicial error in granting defendants' motion for summary judgment.

II.

The Court committed prejudicial error in finding

that from the pleadings and affidavits on file no genuine issue as to any material fact was shown and that the defendants were entitled to a judgment as a matter of law.

III.

That the pleadings and affidavits are sufficient as a matter of law to support a judgment in favor of the plaintiff.

IV.

The Court erred in holding that submission to arbitration was a condition precedent to the maintenance and/or filing of said action.

V.

The Court erred in holding that the defendants had not waived their privilege to raise their plea of abatement on a purely technical grounds after the statute of limitations has run and in not asserting it promptly.

VI.

The Court erred in holding that the defendants were not estopped to raise this plea of abatement of the action.

Dated: August 1, 1956.

L. C. SMITH and
LEANDER W. PITMAN,
DEVLIN, DIEPENBROCK &
WULFF,
/s/ By HORACE B. WULFF,
Attorneys for Plaintiff and
Appellant

[Endorsed]: Filed August 1, 1956.

[Title of District Court and Cause.]

## DESIGNATION OF RECORD

The above named plaintiff hereby requests the entire record to be printed.

Dated August 1, 1956.

L. C. SMITH and
LEANDER W. PITMAN,
DEVLIN, DIEPENBROCK & WULFF,
/s/ By HORACE B. WULFF,
Attorneys for Plaintiff and Appellant

[Endorsed]: Filed August 1, 1956.

---

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

Petition for removal, together with certain attached documents.

Answer to complaint.

Notice of motion for summary judgment by defendant, together with attached documents.

Affidavit of George H. Cox.

Notice of motion to file supplemental complaint.

Memorandum and order.

Summary judgment and order denying motion for leave to file supplemental complaint.

Notice of appeal.

Bond for costs on appeal.

Statement of points upon which appellant intends to rely upon appeal.

Designation of record on appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 15th day of August, 1956.

[Seal] C. W. CALBREATH,
Clerk

/s/ By C. C. EVENSEN,
Deputy Clerk

---

[Endorsed]: No. 15235. United States Court of Appeals for the Ninth Circuit. George H. Cox, also known as George M. Cox, Appellant, vs. English-American Underwriters and The London & Lancashire Insurance Company, Ltd., Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: August 16, 1956.

Docketed: August 21, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15235

GEORGE H. COX, aka GEORGE M. COX,
Appellant,

vs.

ENGLISH-AMERICAN UNDERWRITERS and THE LONDON & LANCASHIRE INSURANCE COMPANY, LTD., a corporation,
Appellees.

## APPELLANT'S STATEMENT OF POINTS ON APPEAL

The appellant does hereby adopt as his statement of points on which he intends to rely on appeal the statement which was filed with the Clerk of the United States District Court, Northern Division of the Northern District of California, on August 1, 1956, and is contained in the original certified record.

Dated: August 20, 1956.

/s/ L. C. SMITH,
/s/ LEANDER W. PITMAN,
/s/ DEVLIN, DIEPENBROCK & WULFF,
Attorneys for Appellant

[Endorsed]: Filed August 21, 1956. Paul P. O'Brien, Clerk.

# No. 15,235

IN THE

# United States Court of Appeals

## For the Ninth Circuit

---

George H. Cox, also known as George M. Cox,

*Appellant,*

vs.

English-American Underwriters and The London & Lancashire Insurance Company, Ltd.,

*Appellees.*

---

**Appeal From a Summary Judgment and Also From an Order Denying Motion for Leave to File Supplemental Complaint Made and Entered by the United States District Court for the Northern District of California, Northern Division.**

## APPELLANT'S OPENING BRIEF.

---

L. C. Smith,
Leander W. Pitman,
1321 Yuba Street, Redding, California,
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*Attorneys for Appellant.*

FILED
JAN 16 1957
PAUL P. O'BRIEN, CLERK

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No. 15,235

IN THE

# United States Court of Appeals
## For the Ninth Circuit

---

George H. Cox, also known as George M. Cox,
*Appellant,*
vs.
English-American Underwriters and The London & Lancashire Insurance Company, Ltd.,
*Appellees.*

---

**Appeal From a Summary Judgment and Also From an Order Denying Motion for Leave to File Supplemental Complaint Made and Entered by the United States District Court for the Northern District of California, Northern Division.**

## APPELLANT'S OPENING BRIEF.

---

I.

### STATEMENT OF JURISDICTION.

This is an appeal from summary judgment for defendants and from an order denying plaintiff's motion for leave to file supplemental complaint, each made and entered by the United States District Court for the Northern District of California, Northern Di-

vision, in an action originally filed in the Superior Court of the State of California, in and for the County of Shasta and removed to said District Court. The jurisdiction of said District Court is conferred by United States Code Title 28, Section 1441 and the jurisdiction of this court upon appeal is conferred by the United States Code Title 28, Section 1291.

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## II.

### STATEMENT OF THE CASE.

This is an action originally brought in the Superior Court of the State of California, in and for the County of Shasta, on a fire insurance policy, whereby plaintiff sought to recover thereunder for the loss which he sustained as the result of a fire. The defendants removed said cause to said District Court on the basis of diversity of citizenship.

The answer of the defendants denies any loss and sets forth six affirmative defenses, four of which are based upon the following clause in the fire insurance policy:

> "No suit or action on this policy for recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with and unless commenced within twelve months next after the inception of the loss."

These affirmative defenses allege that the plaintiff has not complied with the following requirements of said policy:

1. The plaintiff failed to render to the defendants the proof of loss required by said policy within the time therein specified.

2. The plaintiff failed to submit to an examination under oath.

3. The defendants demanded that the amount of the loss be appraised and that said appraisement was not completed at the time of the commencement of the action.

4. The plaintiff failed to furnish an inventory of the lost, damaged and undamaged properties as directed by the policy.

In addition thereto, there is set up by way of affirmative defense that the complaint fails to state a claim upon which relief can be granted and alleges upon information and belief that plaintiff willfully concealed and misrepresented to defendants material facts concerning the subject of the insurance.

After the answer was filed the defendants insurance companies filed a motion for summary judgment on the ground that the defendants were entitled to judgment as a matter of law. As shown by their supporting memorandum (R 15), the motion was premised upon one ground only, that is, "the submission to arbitration is a condition precedent to the filing of a cause of action under a fire insurance policy and until such submission is made, no cause of action exists". This motion was submitted on the five affidavits attached to defendants' said motion (R 15) and the affidavit of the appellant George H. Cox. (R 41.) Shortly

after the filing of said motion, the plaintiff and appellant herein moved the court for leave to file his supplemental complaint wherein he desired to set forth that an award of the arbitrators had been made (at a date subsequent to the filing of said action). The two motions were submitted together. The District Court granted the motion for summary judgment upon the ground that "there was no genuine issue as to whether or not plaintiff submitted to the demand of the defendants for an appraisement pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action and that the plaintiff did not submit to and that there has been no appraisal pursuant to the terms of the policy of insurance prior to the filing of this action." (R 77.) By the same memorandum and order the court denied the plaintiff's motion for leave to file a supplemental complaint. (R 63.) This appeal is from the summary judgment and the order denying leave to file supplemental complaint.

---

## III.

### STATEMENT OF FACTS.

The summary judgment was given pursuant to Rule 56 of the Rules of Civil Procedure, upon the ground that the pleadings and affidavits on file showed that "there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law". We will set forth herein the matters

which show that there was a genuine issue as to many material facts and to this end will primarily review the facts set forth in the affidavit of the plaintiff and appellant herein.

On the 19th day of December, 1952, plaintiff purchased from defendants a policy of fire insurance whereby his dwelling was insured for $10,000.00 and his household furnishings and personal property for $3,000.00. The policy had a term commencing December 19, 1952, and ending on December 19, 1955, and plaintiff paid defendants the premium of $162.50 (see the insurance policy).

At the hour of 1:20 o'clock A.M. on the 25th day of January, 1953, plaintiff's dwelling and all of its contents were destroyed by fire. After plaintiff received certain medical attention for injuries suffered during the fire, he called upon Frank Plummer, the defendants' insurance agent at Redding, California (from whom he had procured the subject policy), and reported the fire. This agent advised plaintiff that the adjuster for the insurance carriers was General Adjustment Bureau, Inc., which maintains an office in Redding, with Mr. J. S. Rogers in charge. Mr. Plummer volunteered to contact Mr. Rogers. Shortly prior to 10:00 o'clock A.M. on the day of said fire, Mr. Rogers contacted plaintiff and they went to the scene of the fire in Mr. Rogers' car. During the course of the trip, plaintiff made a full disclosure of all facts and circumstances surrounding said fire and the losses thereby suffered and answered all questions that Mr. Rogers propounded.

Thereafter, plaintiff contacted both Mr. Rogers and Mr. Plummer three or four times for the purpose of obtaining proofs of loss and for assistance in doing all the things that were necessary under the policy for the insured to do in order to effect the collection of the loss thereunder, but it was not until the 16th day of March, 1953, that Mr. Rogers commenced assisting the insured in the preparation of the proofs of loss. To that end, Mr. Rogers had requested that the insured procure an inventory of all personal property destroyed, except the personal wardrobe of the insured and his family, explaining to the insured that said insurance companies had a lump sum allotment covering losses of personal wardrobes. This inventory was furnished to Mr. Rogers and forwarded by him to the insurance companies with the proof of loss.

The nature and extent of the insured's losses were again fully discussed with Mr. Rogers on the morning of March 16, 1953, when the proofs of loss were filled out and executed. Mr. Rogers assumed the obligation of filling out the entire proof of loss with the exception of the introduction part and the sworn statement and in permitting this method to be followed, the insured assumed that the insurance companies' adjuster knew the requirements of his carriers in this regard. At all of these times the insured willingly and promptly did everything that Mr. Rogers and Mr. Plummer requested of him and at no time did the insured refuse to disclose or give any information requested. Several weeks thereafter, but prior to April 30, 1953, Mr. John W. Smith, adjuster for the General Adjustment

Bureau, Inc., from its Sacramento office, called on the insured at his residence and questioned him at great length relative to the fire and his losses. At this time the insured fully cooperated and answered every question asked him. Nothing further was said until the insured received the General Adjustment Bureau's letters of April 29 and 30, which are Exhibits B and C, respectively, to the affidavit of J. W. Smith. (R 21-22.)[1] Upon the receipt of these letters, the insured called upon Mr. Plummer and told him of the receipt of these letters. They discussed the fact that such letters demanded that the insured be examined under oath in reference to the fire loss and fixed a time and place for such examination and further notified him that the proofs of loss did not fulfill the requirements of the policy and directed that the insured remedy the purported defects therein by filing amendments thereto. At that time, Mr. Plummer stated to the insured in effect that he was fearful that the companies would not pay under the policy and that these letters could be the foundation for their refusal and advised the insured to employ a lawyer before he appeared at the examination requested therein. At that time appellant employed L. C. Smith and Leander W. Pitman. On the 11th day of June, 1953, the appellant filed an action in the Superior Court of the State of California, in and for the County of Shasta, seeking to recover for his loss under said policy. A copy of said complaint is attached to the affidavit of George

[1]It is to be noted that these letters were addressed to the insured, in care of Redding Tire Service, 2638 Angelo, Redding, California, and were promptly received by the insured.

H. Cox and marked Exhibit A. Thereafter, the defendants insurance carriers filed their answer, a copy of which is also attached to said affidavit and marked Exhibit B. Said answer denied that the sum of $13,000.00 or any other sum whatsoever was due plaintiff from defendants and denied that the plaintiff had fully performed all the conditions on his part to be performed by specifically alleging solely that the proof of loss was defective and that the plaintiff failed and refused to submit to examination under oath. Nothing was alleged in the answer respecting an appraisement.

Said cause came to trial on November 3 and 4, 1953, at which time plaintiff was called as a witness and after being first duly sworn testified fully as to the origin of the fire, the nature of the loss, the cost price of the lost property, the market value of the loss and the nature of the items lost. This covered fully the entire subject matter that any examination under oath could cover. At the close of the plaintiff's case, the court expressed itself of the opinion that plaintiff had a substantial sum of money due and owing under the terms of the policy and that there was a grave question in his mind as to whether or not the request of the insurance companies demanding that the insured submit to an additional examination under oath might, under the law, be held to have been a failure to comply with the requirements of said policy. The court further thought that the path of litigation might be hazardous. The counsel for the insured replied that if the court was of that opinion that so far as the plaintiff was concerned he would raise no objections

to the court granting a nonsuit on its own motion, providing it was without prejudice, and the court thereupon did so.

After the trial of said action (November 4, 1953), the insured offered to submit to oral examination by letter to said insurance carriers dated December 21, 1953, and on January 3, 1954, he submitted a supplemental proof of loss containing all the details requested which, for all material purposes, was a duplication of the information theretofore presented. Although the motion for nonsuit was granted on November 4, 1953, the insurers did nothing relative to said policy until the letter of December 23, 1953. Instead of sending said letter to the insured's address, they addressed it to P. O. Box 407, Redding.[2] In view of the fact that said post office box was not the insured's box, the same was not delivered to him by the post office until he was located, that is, until the 6th day of January, 1954. By said letter the insurance carriers for the first time purported to invoke the provisions of the insurance policy relative to appraisement. This letter was not received until 11 months and 12 days after the fire. Within the time allotted by said policy, to-wit, January 13, 1954 (see Exhibit C attached to Stocklmier's affidavit (R 32)), the insured by letter to the carriers named H. J. Bachtold as his appraiser, subject, however, to the following condition:

> "I demand that you, forthwith, and in any event on or before *January 22, 1954 at 4:00 o'clock p.m.*

---

[2]His attorneys' address.

> of day, pay to me the sum of $13,000.00 for the loss sustained by the fire, covered by the policy No. PCD 983103, and if payment of said sum is not made within that time, your failure shall constitute an unconditional refusal to pay and a denial of liability." (R 33.)

The insured received no reply to this letter. Since nothing was done by 4:00 o'clock P.M. on January 22, 1954, and in view of the fact that under the provisions of the policy, the time to commence suit therein expired unless commenced within twelve months next after the inception of the loss, the insured directed his attorneys to file an action in the Superior Court of the State of California, in and for the County of Shasta. This was done at 4:00 o'clock P.M. on January 22nd, the last day the court would be open for the filing of actions within the twelve-month period.

There is utterly no evidence that the delay in completing the appraisal before the twelve months' period expired was caused by the insured. To the contrary, on January 15, 1954, Harry Bachtold, the plaintiff's appraiser, wrote to Mr. Howard T. Russell, the insurers' appraiser, advising him of his appointment and telling him that on January 16 he expected to examine the testimony given at the trial of the case and the proof of loss and ascertain the materials and costs in this locality, and thereafter he would be prepared to proceed with their duties. He further advised that he was available on any day of the next week (January 18 to 22) for consummating said appraisal. Mr. Bachtold also advised Mr. Russell that

the insured expressed the view that he would like to have the matter disposed of at an early date. (R 35.) This letter was received on January 18, leaving five days prior to the outlawing, which may have been ample time for two reasonable men to agree upon an appraisement. Irrespective thereof, the insurers' appraiser did not even seek to obtain a date for such meeting until he telephoned Mr. Bachtold on January 27, 1954 (which was two days after the right to commence the action had lapsed. (R 47).) The two subsequent letters between Messrs. Bachtold and Russell deal merely with the endeavors to agree upon a date (R 36-37) which shows no fault or participation of the insured. Since the two appraisers failed within the time fixed by the policy to agree upon a disinterested umpire, Albert F. Ross, Judge of the Superior Court of the State of California, in and for the County of Shasta, did on the 22nd day of September, 1954, select W. N. Zachary as such umpire and that on the 18th day of December, 1954, said umpire notified the plaintiff and defendants that he would meet with said appraisers on the 4th day of January, 1955, and he then and there heard testimony and also made examination and inspection of the site of the destroyed dwelling and such ruins as remained. The appraisal of the two appraisers ended in a disagreement and their said differences were submitted to the umpire and on the 10th day of March, 1955, said umpire agreed with the insured's appraiser and made the award in writing, wherein and whereby the actual cash value of the loss of the dwelling house and garage was fixed at $9,500.00 and the actual cash value of

each of the items of personal property likewise destroyed was appraised at $5,205.00. The original appraisement or award was filed with the defendant English-American Underwriters, on the 29th day of March, 1955. (R 56-57.)

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## IV.

### SPECIFICATIONS OF ERROR.

1. The District Court erred in granting defendants' motion for summary judgment and in finding from the pleadings and affidavits on file that no genuine issue as to any material fact was shown and that defendants were entitled to a judgment as a matter of law. To the contrary such evidence would have supported a verdict in favor of plaintiff.

2. The court erred in holding that the submission to arbitration was a condition precedent to the maintenance or filing of said action.

3. The court erred in holding that the defendants were not estopped to raise the plea of abatement of the action.

4. The court erred in holding that the defendants did not waive any right to raise their plea of abatement on a purely technical ground after the statute of limitations had run.

V.

## ARGUMENT.

As stated heretofore, the summary judgment was based solely upon a plea of abatement, to-wit, the issue of prematurity. It was premised entirely upon the court's finding that "there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action, and that plaintiff did not submit to and that there has been no appraisal pursuant to the terms of the policy of insurance prior to the filing of this action." (R 77.)

As shown by the policy, the appraisal is not self-executing. The appraisal is based upon the presence of two conditions precedent, that is, (1) that the insured and the company have failed to agree as to the actual cash value or the amount of the loss and then (2) an appraisal can be had on the written demand of either. The provision of the policy with reference to appraisals is as follows:

> "APPRAISAL. In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire

> shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

The claim of prematurity is based upon the following provision of the policy, "no suit or action on this policy for the recovery of any claim shall be sustained * * * unless all the requirements of this policy shall have been complied with and unless commenced within twelve months next after the inception of the loss."

The case at bar was filed on the last court day within the twelve months next after the inception of the loss, just prior to the running of the statute of limitations provided in said policy. Since plaintiff did not receive the written demand for an appraisal from the defendant until January 6, 1954, and since plaintiff selected his appraiser on January 13, 1954 (well within the twenty-day period prescribed by the policy), there remained approximately nine working days in which to complete the appraisal. At 4:00 o'clock P.M. on the last court day in which to commence said action, the appraisal was not completed nor had the appraisers even met. To construe the provisions of the policy to mean that the action can not be commenced

until the appraisal is filed, irrespective of when the written demand therefor was received, would create a trap for the unwary and deprive insureds of the proceeds of their policies by dilatory tactics on the part of the insurer.

In this suit on a fire insurance policy for losses occurring in California the policy must be construed under California law (*Hayland v. Millers National Insurance Co.*, 191 Fed. (2d) 735 at 737). We desire at the outset to refer to the decision of the Supreme Court of California in *Bollinger v. National Fire Insurance Company*, 25 Cal. (2d) 399. In that case the insurer and the assured entered into an agreement fixing the amount of the loss in a given amount. On the same day the defendant denied all liability under the policy on the ground that at the time of the fire the insured was not the sole and unconditional owner of the insured personal property. Before the lapse of 30 days from the time of the agreement upon the amount of the loss, the insured filed an action to recover under said policy. The defendant asserted the defense of prematurity, based on the policy provision that no action should be commenced until the lapse of a waiting period of 30 days from the time of the agreement upon the amount of the loss. The trial court granted a judgment of nonsuit based thereon at a time when the one-year statute of limitations had run. The insured then commenced a new action and the defendant demurred, claiming that the action was barred because it was commenced more than fifteen months after the fire. The trial court sustained the

demurrer and the plaintiff appealed. We desire to refer to the language of the court relative to pleas of abatement as to issues of prematurity appearing on page 405:

> "The insurance policy incorporated by reference in the complaint is of the usual complexity. While courts are diligent to protect insurance companies from fraudulent claims and to enforce all regulations necessary to their protection, it must not be forgotten that the primary function of insurance is to insure. When claims are honestly made, care should be taken to prevent technical forfeitures such as would ensue from an unreasonable enforcement of a rule of procedure unrelated to the merits. (Citing cases.) * * * Dilatory tactics are not favored by the law, for they waste the court's time, increase the cost of litigation unnecessarily, and may easily lead to abatement of an action on purely technical grounds after the statute of limitations has run. (Citing cases.) Defendant's plea of prematurity was a dilatory plea in abatement, unrelated to the merits and not asserted for nearly a year after plaintiff's action was filed."

Further, the Supreme Court on page 411 stated the following relative to the assurer's duty of good faith to its insured:

> "* * * The present case involves an insurer whose duty of good faith in dealing with the insured is well established. (See 13 Appleman, Insurance Law and Practice 37; Vance, Insurance (1930) 74.) It is likewise unnecessary to dwell upon the contention that the insurer's duty of good faith to its insured arises at the time of con-

tracting and persists throughout the period when premiums are paid and no return is sought, but that when a loss occurs and the insured seeks to obtain the compensation provided in the contract, the parties deal at arm's length. It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture."

We believe these general principles of law were not given proper weight by the trial court. Under the facts heretofore stated and as will be demonstrated hereinafter, a genuine issue as to liability of the insurer exists in the case at bar. In order to justify the trial court's summary disposition of all issues made by the pleadings and to deprive the plaintiff of his right to trial by jury, this Honorable Court must hold, as so ably was stated by the late Judge Cardozo:

> " 'To justify a departure from the course and the award of summary relief, the court must be convinced that the issue is not genuine, but feigned, and that there is in truth nothing to be tried.' Curry v. Mackenzie, 1925, 239 N.Y. 267, 270, 146 N.E. 375, 376."

See the opinion of this court in *Byrnes v. Mutual Life Insurance Company of New York,* 217 Fed. (2d) 497 at 500.

In interpreting Rule 56, the Supreme Court of the United States has stated that said rule:

> "* * * authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 1944, 321 U.S. 620, 64 S.Ct. 724, 728, 88 L.Ed. 967."

We respectfully contend that the affidavit of the insured, as well as the other affidavits on file, presents issues and sets forth sufficient facts to warrant a verdict in insured's favor by a jury to whom the issues might be presented for several reasons. These reasons will be listed under the following subheadings.

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**(A) THE COURT ERRED IN GRANTING A SUMMARY JUDGMENT; A GENUINE ISSUE AS TO MATERIAL FACTS WAS SHOWN BY THE PLEADINGS AND AFFIDAVITS AND, IN FACT, THEY ARE SUFFICIENT TO SUPPORT A JUDGMENT IN FAVOR OF PLAINTIFF.**

The summary judgment was based solely upon the finding that "there is no genuine issue as to whether or not the plaintiff submitted to the demand of the defendant for an appraisal pursuant to the terms and conditions of the policy of insurance referred to in the complaint prior to the filing of this action, and that the plaintiff did not submit to, and that there has been no appraisal pursuant to the terms of the

policy of insurance, prior to the filing of this action''. (R 77.) This finding finds no support in the record whatsoever.

It was not necessary to submit the question of the amount of damages sustained to arbitration as a necessary prerequisite to maintaining an action on the fire insurance policy for the reason that the policy provided first, that there must be a dispute regarding the amount of the loss and, secondly, a written demand for appraisal must be served by one party upon the other in a time and manner that would permit a submission. (Of course, the provisions of a policy relative to appraisal could also be waived or lost by estoppel.) It is only when both of these conditions occur that the provisions relative to appraisements become applicable.

There is no evidence in the record that the insurers and the insured failed to agree as to the actual cash value or the amount of the loss, nor is it shown that any endeavor was ever made by them, either to agree or disagree in that regard. The record does show that two of the agents of the insurers' adjustment bureau visited the premises shortly after the fire occurred and, hence, the company should be charged with knowledge of total loss of the properties. The only evidence as to the insurers' reaction to the amount of the loss appears in its answer to the first action in Shasta County. In Paragraph V of said answer the insurers denied that the sum of $13,000.00, *or any other sum whatsoever is now due plaintiff* from defendants. (R 52.) This allegation constituted an unconditional de-

nial of liability. Therefore, it is respectfully submitted that the first condition precedent to the requirement of appraisal, namely, the failure to agree as to the amount of the loss, is not shown.

Relative to the written demand, the same was received from the insurers by the insured at a time when it was difficult, if not impossible, to perform. The record is entirely void of any proof that the plaintiff failed or was in any manner unwilling to submit to such demands and the appraisal pursuant thereto. But to the contrary, the plaintiff did everything he could to effect a submission.

The provision of the policy relative to the commencement of suit is extremely pertinent:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity *unless all the requirements of this policy shall have been complied with,* and unless commenced within 12 months next after inception of the loss."

It is to be noted that the two conditions which defeat a suit are that all the requirements of the policy have not been complied with by the insured and, secondly, under any circumstances the action must be commenced within 12 months next after the inception of the fire. We respectfully submit that the insured complied with all of the requirements of the policy with respect to appraisal. The written demand dated December 23, 1953, was not received by the insured until January 6, 1954. (R 32, 46.) This delay was caused by the insurers in that they did not address

the letter to the insured's address, used on other previous occasions. (R 21, 22.) Within the 20 days from the receipt[3] of the demand, on January 13, 1954, the insured addressed a letter to the insurers nominating and appointing H. J. Bachtold as his appraiser. In said letter it is to be noted that the insured expressly stated in the letter that this person was appointed "for immediate performance of his duties prescribed by the terms of my policy" and, further, said letter made a demand that the payment under the policy be made prior to the lapse of said 12 months' period, that is, before the last day an action could be filed, to-wit, Friday, January 22, 1954. (R 33.) This letter was received in due course by the insurers. (R 28.) On January 15, 1954, the insured's appraiser, H. J. Bachtold, wrote a letter to Howard T. Russell, the insurers' appraiser, advising him of his appointment and stated that on January 16, 1954, he was going to examine the testimony given at the first trial, the proof of loss and ascertain the materials and costs in the locality and that he would be prepared to proceed with his duties any day of the next week between Monday and Friday (January 18 to January 22). Said letter also contained the following: "Mr. Cox expresses the view that he would like to have the matter disposed of at an early date." (R 36.) The insurers' appraiser, Mr. Russell, although he received the letter, did nothing about it until after the 12 month period for bringing suit expired, in that he

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[3]The 20 days time to name appraisers runs from the date of the receipt of the demand, *Covey v. National Union Ins. Co.*, 31 Cal. App. 579 at 589.

first communicated with H. J. Bachtold (by telephone) on January 27, 1954. Contrary to the findings of the trial court, the insured did all matters and things required of him under the terms and conditions of the policy to effect and consummate an appraisal prior to the expiration of the 12 month statute of limitations. The appraisal proceedings were delayed beyond the 12 month period by the insurers' delay in demanding appraisal and by the insurers' appraiser, in that he did not even acknowledge the receipt of the letter of January 15 until two days after the running of the statute. Where the submission to arbitration fails of results by reason of the failure of the appraiser of the assurer, and the insured and his appraiser have fully performed their obligations as to arbitration, the insured need not proceed further with the view to ultimate arbitration as a condition precedent to suing on the policy.

The leading case on this question is *Koyer v. Detroit F. & M. Ins. Co.,* 9 Cal. (2d) 336. In that case the insured gave demand for appraisement and named the appraiser and the insurer named its appraiser but the appraisers failed to select an umpire until July 10, 1933. The appraisers did not meet with each other to compare notes for the first time until July 12, 1933, which was the date of the expiration of the 90-day period in which the appraisal should be consummated. The insured then filed the action to recover under the policy and the defense of prematurity was raised by the insurer. The trial court found that the award or appraisal was not had or completed within the

90-day period through no fault of the insured or his appraiser. The court on appeal sustained the trial court and at page 341 stated:

> "* * * Therefore, the rule by which plaintiff's conduct is to be adjudged is the following: where a submission to arbitration fails of results by reason of the failure of the appraisers to agree upon an umpire, and both the insured and insurer have acted in good faith so that the failure is not due to the fault of either, *the insured has fully performed his obligation as to arbitration and need not proceed further with a view to ultimate arbitration as a condition precedent to suing on the policy.* (See 94 A.L.R. 502.) A reasonable interpretation of the finding which we have quoted is that the delay was caused by the failure of the appraisers to select an umpire and thereafter to proceed diligently with their work. This interpretation, which is borne out by the evidence, would imply that the appraisers were equally at fault—at least that the fault was not entirely that of the insured's appraiser—and under these circumstances it could not be said that the delay was attributable to the insured or his appraiser within the meaning of the policy provisions. The insured would be no more to blame than the insurers. By the terms of the policies the insured was responsible for the fault of his appraiser if it resulted in the failure of the appraisal, and the insurers had an equal responsibility for the conduct of the appraiser appointed by them. When, therefore, the appraisement failed for causes not attributable to the appraiser for the insured (and the failure due to the fault of both appraisers presents such a

case), the insured was not precluded from maintaining an action on the policies. *The limitation of plaintiff's right to sue was removed when the appraisal failed because of the fault of both appraisers. The provisions of the policies admit of no other construction.*" (Italics ours.)

In the note in 94 A.L.R. referred to in the above quotation, the authorities are exhaustively compiled. These show that under the great majority view, including California, the failure of the appraisal to be consummated within the specified time (not caused by the insured), permits suit to recover under the policy without an appraisal first being had. This view was likewise followed by this Honorable Court in *Aetna Ins. Co. v. Heffnerlin,* 260 Fed. 695, where the court on page 700 stated:

> "* * * Having once, in good faith, undertaken to have an estimate of the amount of his loss made by appraisers appointed pursuant to the terms of the policy, and the appraisement having been defective and invalid, without fault on the part of the insured, he is not obliged to join in an attempt to have another appraisement but may maintain this action. Uhrig v. Williamsburgh Fire Ins. Co., 101 N. Y. 362, 4 N.E. 745; Western Assurance Co. v. Decker, 98 Fed. 381, 39 C.C.A. 383; Solem v. Conn. Fire Ins. Co., 41 Mont. 351, 109 Pac. 432."

In *Covey v. National Union Fire Ins. Co.,* 31 Cal. App. 579, the insurer made its demand for an appraisal more than 90 days after the preliminary proof of loss was received by it (demand was received by

plaintiff on the 91st day). The court held that "not having received notice in time, plaintiff (insured) was not compelled to submit to appraisement of the loss and the case stood as though no appraisal was had". (See page 589.)

The result should be the same whether the notice was received after the time allowed or, as in the case at bar, at a time so shortly before the expiration of such time that the appraisement was not completed within the required time, solely through the fault of the insurer and/or its appraiser. We respectfully submit that the sole express ground of the trial court's decision finds utterly no support in the record. To the contrary, the record supports the conclusion that the insured complied with all the requirements of this policy relative to appraisal and, hence, had the right to commence said action without awaiting the completion of appraisal proceedings.

The only reasonable construction of the limitation of action provision of the policy is that the two conditions of said provision must be so coordinated so that the insurers' exercise of one condition will not defeat the other. The policy can not be construed to permit the insurers to so delay the exercise of any requirement of the policy as to put the insured in a position where he cannot enforce his right to recover under the policy. Therefore, the phrase "unless all the requirements of this policy shall have been complied with" when applied to the performance of the appraisal clause of said policy must be construed to mean that the failure to complete an appraisal does not bar an

action upon the policy unless such failure was caused by the delay or fault of the insured. The facts are undisputed that the insurers without provocation delayed the demand for the requirement of an appraisal until so close to the end of the period of limitation of action that the insured was unable (despite full performance or compliance with the terms of the policy) to cause the appraisal proceedings to be completed prior to the outlawing of the action. The limitation upon the insured's right to sue was removed when the appraisal failed because of such delay. The provisions of the policy admit of no other construction. Therefore, the trial court's holding that the insured failed to submit to such appraisal and because thereof there has been no appraisal pursuant to the terms of the policy, was prejudicially erroneous.

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**(B) THE COURT ERRED IN HOLDING THAT THE DEFENDANTS DID NOT WAIVE THEIR RIGHT TO RAISE THE PLEA OF ABATEMENT.**

The rule is well settled in the California courts, and also in the federal and most state courts, that an unconditional denial of liability by the insurer after the insured had incurred loss and made claim under the policy gives rise to immediate right of action and the provisions for appraisement are waived. This rule is reaffirmed in *Bollinger v. National Fire Ins. Co., supra* at page 405, where many cases are cited therefor. The court in the *Bollinger* case further states at page 405 that "the desirability of the rule is ap-

parent for if a waiting period was necessary notwithstanding the election of the insurer to deny liability, it would become a trap for the unwary and would encourage dilatory tactics as in the present case". The above is particularly applicable to the case at bar as will be shown in the next point.

Reference is made to *Jacobs v. Farmers Mutual Fire Ins. Co.*, 5 Cal. App. (2d) 1, involving the necessity of submitting the question of the amount of loss sustained to arbitration as a necessary prerequisite to maintaining an action on the fire insurance policy, particularly the following language appearing on page 7, to-wit:

> "It will be observed that the policy in this case does not absolutely require arbitration as a condition precedent to the maintenance of an action. It is only *when there is a dispute between the parties* regarding the amount of the damages sustained that arbitration is required. The case of *Old Saucelito Land & Dry Dock Co. v. Commercial Union Assur. Co.*, 66 Cal. 253 (5 Pac. 232), relied on by the defendants, may be readily distinguished from the principle above announced. In the case last mentioned, the complaint specifically alleged 'that a difference arose as to the amount of loss'. In that event an arbitration did become a condition precedent to the maintenance of the action. The court quite properly held in that case that the failure to arbitrate the amount of the disputed loss was a bar to the action. In the present case no such dispute was alleged or proved. The failure to arbitrate the amount of the loss was therefore not a bar to this action."

Prior to the receipt of the demand on January 6, 1954, the insured was never advised in any form of a disagreement as to the amount of the loss or the amount of the reasonable market value of the property destroyed. But, to the contrary, from the date of the fire, the insurers conducted a series of dilatory tactics by making successive demands for the performance or the further performance of every requirement of the policy, the failure to comply with any one of which would relieve the insurers from all liability. The only exception to the above statement is the answer that the insurers filed in the first action before the Superior Court of Shasta County. By Paragraph III of their answer, they denied generally the allegation of the complaint that "the plaintiff's loss thereby was $14,670.40". Further, by the fifth paragraph of their answer, it is averred:

> "Answering the allegations of Paragraph VIII,[4] defendant denies that the sum of Thirteen Thousand Dollars ($13,000.00), or any sum whatsoever, is now due plaintiff from defendant * * *" (R 52.)

The trial court's opinion stated that it was not aware of any case which involved the precise situation where there was an answer by the insured to a complaint in a prior suit in which a nonsuit was granted, but the court stated that the authorities cited in 3 A.L.R. (2d) 416 (holding that a denial of liability

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[4]Paragraph VIII of the complaint reads that no part of said loss has been paid and the sum of $13,000.00 is now due thereon from the defendant to the plaintiff to plaintiff's damage in the sum of $13,000.00. (R. 50.)

by an insurer in its answer to the complaint does not constitute a waiver of arbitration in an action in which the complaint was filed) was applicable to the condition herein involved.

We respectfully submit that the court below is in error in this regard. The California courts have held that the mere denial of liability does not prevent the pleader from asserting the defense of failure to submit to arbitration, they further hold that if the pleader proceeds to trial on merits (based upon such general denial of liability) without properly asserting the requirement of appraisal, the plea of prematurity because of lack of appraisement is waived. See *Lanrith v. So. Coast Rock Co.,* 136 Cal. App. 457 at 462; *Pneucrete Corp. v. U. S. Fid. & Guarantee Co.,* 7 Cal. App. (2d) 433 at 441.

Since the insurers proceeded to trial in Shasta County on the merits without asserting the defense of failure to submit to arbitration, the defense was waived in the first action. Further, the defendants waived said defense by neglecting to specifically plead a lack of arbitration. (See *Jacobs v. Farmers Mutual Ins. Co., Inc., supra,* at page 7.) From the foregoing, the defendants by their failure to plead and by submitting to trial on merits without asserting the defense, have clearly waived the same. Is this waiver only applicable to the first action or can the waiver be asserted in subsequent actions? The law is that any unconditional denial of liability by the insurers after the insured has incurred the loss and made the claim under the policy, gives rise to an immediate

right of action. The form of the denial of liability should be immaterial, that is, whether it is merely stated orally, or is put in letter form or is set forth in a verified pleading. Whatever be its form, the question of whether it constitutes an unconditional denial of liability depends upon its contents. The denials of this answer were unconditional and further verified.

If the insurers had any doubt as to the question of the amount of the loss, their denial in that regard could have been upon the want of information or belief. By that type of denial they would have indicated the absence of an *actual* controversy as to the amount of the loss. In the case at bar, however, two representatives of the insurers' adjustment bureau examined the insured in great detail on two different occasions, visited the scene of the fire and obtained an inventory of the property lost. With that information it must be inferred that they had ample knowledge of the extent of the loss. This conclusion was confirmed by an absolute denial set forth in their answer, which was verified approximately six months after the date of the fire.

We respectfully submit that proceeding to a trial upon this verified denial of all liability under the policy clearly comes within the definition of an unconditional denial of liability and constitutes a waiver of the defense of lack of appraisement in any subsequent action between the parties on the same cause of action.

(C) THE COURT ERRED IN HOLDING THAT DEFENDANTS WERE NOT ESTOPPED TO RAISE THIS PLEA OF ABATEMENT.

The insurers were clearly guilty of dilatory tactics for the purpose of defeating the insured's right to a trial on merits. Although the insurers had full knowledge of all necessary facts, they presented these dilatory objections piece-meal—raising one and when that one had spent its course raising a new one—and continuing this course of tactics until they would have succeeded in defeating the insured's day in court on the merits of his cause. These dilatory tactics rendered it impossible to comply with the provisions of the policy before the time for filing suit expired. Under these circumstances and under the facts set forth in this record the insurers are estopped from setting forth their plea of abatement on the ground of prematurity.

It would be manifestly unjust for this court to prevent a trial on the merits, which the law favors, thereby causing a technical forfeiture of the insured's rights, which the law discourages, by upholding the plea of prematurity of the commencement of the action caused solely by traps formulated and executed by the insurers.

The insured purchased for the consideration of $162.50 the policy of fire insurance for a term of three years covering the real and personal property which was destroyed by a fire occurring during the term of said policy, on the 25th day of January, 1953. The purpose of this insurance policy was to insure and to

pay a stipulated amount of loss in the event of destruction by fire.

The insured, by insurers' tactics, is deprived of the benefits of the contract which the insured purchased. Although the insured made a full disclosure to both Frank Plummer and John W. Smith, two of defendants' agents employed by them to adjust this loss, the insurers did not elect to request an appraisal proceeding to determine the amount of this loss at any time until approximately 19 days before the expiration of the period for the commencement of the action. Instead of doing anything that would indicate to the insured that there was a controversy as to the amount of the loss or the reasonable market value of the loss of the properties destroyed, the insurers first gave notice of a defective proof of loss (although this was prepared by the insureds' own agent) and, secondly, gave notice of the failure of the insured to submit to an examination under oath. The latter was made even though the insured was extensively interviewed and examined by both the insurers' local and district adjusters. The insurers sprang this trap at the trial of the first filed action. The nonsuit in that action was based upon one ground, that is, that plaintiff did not submit to examination under oath. This plea was extremely technical in that the insured, in addition to being interviewed as above stated, *was examined extensively at trial under oath, but still the trial court felt that the motion should be granted so that the plaintiff could protect himself in the future from any such technical pleas of abatement.* (R 45). This trap

was not fatal in that the period of limitations had not run at that time and sufficient time remained for the plaintiff to submit to a further examination under oath and commence a new action.

Although this nonsuit was granted on November 4, 1953, or 82 days before the 12 month period prescribed by the policy expired, and although the insurers owed a duty of good faith to the insured the insurers did nothing until they forwarded their letter of December 23, 1953. The insurers by said letter fixed the time and place for the taking of said testimony under oath as the 7th day of January, 1954, at the office of Lawrence J. Kennedy, Jr., in the Courthouse in Redding, and by the same letter and for the first time demanded an appraisal. This letter was registered, with return receipt requested, and the post office was unable to locate Mr. Cox to sign said return receipt until January 6, 1954. Therefore, there remained but 19 days before the 12-month period would expire in which to consummate the appraisal proceedings and to have an award filed. It is but a natural inference that at that time the defendants made this election, they knew that the appraisal proceedings could not be consummated before the expiration of the period of limitations on January 25, 1954. This is self-evident, because the policy provides that the insured would have 20 days from receipt of such demand to appoint an appraiser and then if the appraisers neglected to appoint an umpire for a period of fifteen days then the Superior Court could appoint one. The operation of these provisions of the policy

obviously contemplate a period of greater than 19 days.

Seven days from receipt of the demand, on January 13, the insured wrote a letter designating and nominating his appraiser and suggesting immediate performance of the duties of the appraiser. In that letter, he warned that if the loss were not paid by the last day an action could be filed under the policy that such failure constituted a refusal to pay and an unconditional denial of liability. The appraiser appointed by the insured immediately (by letter dated January 15, 1954) advised insurers' appraiser that he would make all preliminary investigations and reviews promptly and would be prepared to meet with him any day between January 18 and January 22 and suggested therein that the matter be disposed of immediately. The insurers' appraiser did not act on this request until January 27, 1954, two days after the limitation period had expired, when he communicated telephonically with the insured's appraiser. Although the insured and his appraiser did everything humanly possible to consummate the appraisal between the time of the receipt of the demand therefor and the expiration of the limitation period, and even if it was possible to consummate the appraisal during such a short period, the failure to do so was caused solely by the insurers' appraiser.

Irrespective of these circumstances, the insurers by their answer filed on March 16, 1954, sought to defeat a recovery under the policy by the plea of prematurity of the action, because the award of the appraisers

was not completed before the action was filed. It is to be noted that there was no cause for any delay in making the demand for the appraisal, if the appraisal was sought for the purpose of determining the amount of the loss and not to defeat a recovery. This is true first because the insurers' investigation and the proofs of loss and inventory filed with them should have amply informed the insurers as to whether any controversy existed relative to the amount of the loss. Secondly, after the entry of the nonsuit on November 4, 1954, the insurers had the additional benefit of the insured's testimony under oath at the trial, but still the insurers did nothing until the insured recomplied with the two defenses raised in the first action. It is of interest to note that the insurers did not postpone their demand until after the plaintiff was again examined under oath on January 7, 1954. This demonstrates that the examination under oath served the insurers no useful purpose other than to attempt to defeat recovery under the policy. Since there were no contacts between the insurers and the insured between November 4, 1953, and December 23, 1953, nothing could have occurred which could have warranted the delay in demanding an appraisal during that period.

We respectfully submit that the insurers were guilty of bad faith and likewise guilty of such premeditated conduct as to render it impossible for the insured to comply with the provisions of the policy within the time permitted by the policy. The language of the court in *Fitzpatrick v. N. A. Accident Ins. Co.*, 18 Cal. App. 264 at 266 is particularly applicable:

> "If the company had been guilty of bad faith or such conduct as to render it impossible to comply with the provisions of the policy before the time limited for presenting suit had expired, it would be estopped from relying thereon (Joyce on Insurance, Section 3220.)"

Likewise, the language appearing in *Amusement Syndicate Co. v. Prussian National Ins. Co.,* (Kansas) 116 Pac. 620 at 623:

> "It will not be in furtherance of justice to allow them after having remained so long silent on the subject to raise the question of arbitration, not for the purpose of procuring an appraisement of the loss but to defeat recovery."

The shocking injustice of the defendants' plea of prematurity is clearly manifested by the fact that if the insured had waited for the completion of the appraisal proceedings, his rights to commence an action would have been forever barred by the limitation of action provision of the policy.

Since the policy provided that the insured was required to comply with all the provisions of the policy and also commence an action within twelve months next after the inception of the loss or be forever barred from recovering under the policy, the insurers should be estopped and completely debarred from relying on the appraisal provisions of said policy, when, as here, they have timed their demand so that it is physically impossible for the insured to comply with such provisions within the time limited for bringing suit. No court would be justified in making it possible

for an insurer to befeat the performance of its contracts by formulating such a trap for the insured, so that no matter which way he elected to proceed, he was debarred from enforcing the policy.

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(D) THE COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPPLEMENTAL COMPLAINT.

As shown above, the insurers instigated the appraisal proceeding at a time when it was problematical that it could have been completed prior to the running of the period to bring the action, and, hence, for several reasons the insurers could not assert the defense of prematurity of the commencement of the action.

There resulted from insurers' said delayed demand a further complication, which again compelled the insured to act at his peril. The further complication was the question whether this appraisal proceeding, which did not result in an award until after the limitation period expired, was or was not operative. Since the insurers started this proceeding and put the insured to the effort and expense thereof, the insurers should be bound by any award therefrom, and to that end the insurers should be estopped to deny the validity thereof, merely because it was not concluded in the twelve months period.

To avoid another trap, the insured filed his motion for leave to file a supplemental complaint, setting forth the appraisal proceedings and resultant award. If the award is valid, which appellant claims it is,

then one issue made by the complaint and answer thereto has been altered by a subsequent event. To deny a party the right to set forth this changed or altered issue by way of a supplemental complaint is an abuse of discretion by the trial court.

It is the very office of a supplemental pleading to set forth any enlarged or changed kind of relief to which a plaintiff is entitled. (See *Popovitch v. Kasperlek,* 76 Fed. Supp. 233.) The insured in the case at bar was just as much entitled to set up this award as the party was entitled to set up that the action had become *res judicata* by virtue of proceedings in the state court, as in *Kimmel v. Yankee Lines,* 125 Fed. Supp. 702, affirmed in 224 Fed. (2d) 644. The trial court denied the motion in the case at bar upon the erroneous ground that the action was prematurely brought.

As shown hereinbefore, the action was not premature and not being such the subsequent change in one issue (amount of recovery) should have been made a part of said action by the granting of the insured's said motion.

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## VI.

### CONCLUSION.

We have conclusively shown that the record will support a finding either that the insured had complied with every requirement of the policy, or that the insurers have waived or are estopped to set up the appraisal provisions of the policy. If there is any evi-

dence to support a verdict for the plaintiff, this summary dismissal was erroneously granted and should be reversed. Since there was ample evidence to submit to a jury on the issues herein involved, it was prejudicial error to deny plaintiff that constitutional right. It is respectfully submitted that judgment and order below be reversed.

Dated, January 14, 1957.

Respectfully submitted,

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*Attorneys for Appellant.*

No. 15,235

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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George H. Cox, also known as George M. Cox,

*Appellant,*

vs.

English-American Underwriters and The London & Lancashire Insurance Company, Ltd.,

*Appellees.*

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**Appeal From a Summary Judgment and Also From an Order Denying Motion for Leave to File Supplemental Complaint Made and Entered by the United States District Court for the Northern District of California, Northern Division.**

## APPELLEES' BRIEF.

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No. 15,235

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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George H. Cox, also known as George M. Cox,
*Appellant,*
vs.
English-American Underwriters and The London & Lancashire Insurance Company, Ltd.,
*Appellees.*

**Appeal From a Summary Judgment and Also From an Order Denying Motion for Leave to File Supplemental Complaint Made and Entered by the United States District Court for the Northern District of California, Northern Division.**

## APPELLEES' BRIEF.

---

This is an appeal by the plaintiff (the insured under a policy of fire insurance issued by the defendant) from a summary judgment denying him recovery under the policy and from an order denying his motion for leave to file a supplemental complaint.

Summary judgment was granted on the ground that there had been no appraisal of the loss before the filing of the action and that, under the terms of the

policy, such an appraisal was a condition precedent to plaintiff's right to file the action. Leave to file a supplemental complaint (alleging that the loss was appraised after the filing of the original complaint) was denied on the ground that a complaint, which, as originally filed failed to state a cause of action (because of the plaintiff's failure to comply with a condition precedent to its filing) cannot be made to state a cause of action by alleging compliance with the condition precedent after its filing.

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## STATEMENT OF THE CASE.

On January 25, 1953, the insured premises were completely destroyed by fire (41).[1]

On March 20, 1953, within the sixty days allowed for that purpose by the policy, plaintiff filed a sworn proof of loss with defendant (17).

On April 29, 1953 (three months and four days after the fire), defendant requested that plaintiff submit to an examination under oath as provided for in the policy (21). The examination was scheduled for May 7, 1953, in Redding.

On April 30, 1953, defendant advised plaintiff that his proof of loss was defective in several respects and suggested that he file amendments thereto (22-23). Defendant further advised him (1) that it was neither admitting nor denying liability, (2) that it was not

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[1]All references will be to pages of the Transcript.

admitting the amount of loss claimed by him, and (3) that it was waiving none, and in fact was reserving all, of the terms, conditions or provisions of the policy (24).

Sometime within the next few days and, at any rate, before May 7, 1953 (within not more than three months and twelve days after the fire), plaintiff employed Messrs. L. C. Smith and Leander W. Pitman as his attorneys. Both have represented him ever since (44) and are now his attorneys on this appeal.

Plaintiff did not appear for the scheduled examination under oath. Instead, on May 7, 1953, Mr. L. C. Smith, wrote the following letter to the attorney who was to examine plaintiff under oath on behalf of defendant (26):

"Lawrence Kennedy, Jr., May 7, 1953
Attorney at Law
Courthouse, Redding, California

Dear Mr. Kennedy:

"I am writing in connection with the claim of George Cox, Policy No. P983103, upon which there has been a number of oral and written examinations, not less than four in number, some of which were reduced to writing and under oath, and now you want another one. After all, there is an end to this third degree some place.

"We regard your present action as not a reasonable request within the terms of the policy, but one to annoy and harrass these people as a substitute for your promise to pay in the event of a loss. For these reasons your request for another and additional oral examination is refused.

> "When we bring suit, you will again have the right to take these people's deposition, if you feel so disposed. At that time they will be represented by counsel and the necessary interrogations will be confined and circumscribed by rules of evidence.
>
> Very truly yours,
>
> LCS:jss L. C. Smith"

This court will note that no mention of that letter is made in plaintiff's brief.

On June 11, 1953, plaintiff filed suit in the Superior Court of the State of California, in and for the County of Shasta. The record does not show when the complaint was served but, in any event, defendant's answer was filed on July 17, 1953, one month and six days after the filing of the complaint (25).

The case was tried on November 3 and 4, 1953. On November 4, 1953, a nonsuit was granted because of plaintiff's refusal to submit to the requested examination under oath (25-26, 53).

Although precious time had been lost as a result of plaintiff's refusal to submit to that examination, more than 2½ months still remained before the expiration of the 12-month period within which the policy required that suit be brought.

For the next 47 days, however, plaintiff chose to do nothing.

This court will note that, on page 9 of his brief, plaintiff accuses *defendant* of having done nothing

during that period. The point is, however, that there was nothing that defendant could have done until, on December 22, 1953, it received the letter (dated December 21, 1953) in which plaintiff finally offered to submit to an examination under oath (29-30).

It took defendant one day to answer that letter.

On December 23, 1953, defendant accepted plaintiff's offer to submit to an examination under oath and scheduled it for January 7, 1954. In the same letter, defendant also called for an appraisal of the loss, appointed its appraiser and requested plaintiff to appoint his (30-31).

That letter was apparently not received by plaintiff until January 6, 1954. Although plaintiff does not in so many words accuse defendant of having intentionally misdirected it, the implication is rather plain as to what he would like this court to believe. In fact, however, defendant's letter of December 23, 1953, was sent to the very address (Box 704, Redding, California) shown at the top of plaintiff's letter of December 21, 1953 (29-30). Where else defendant could or should have sent its reply is not made clear in plaintiff's brief.

On January 7, 1954, plaintiff was examined under oath.

On January 13, 1954, one week after he had received defendant's letter asking for an appraisal of the loss, plaintiff appointed his appraiser (32-33). On the same day, plaintiff mailed a supplemental proof of loss to defendant (33) (on page 9 of plaintiff's

brief, the supplemental proof of loss is erroneously said to have been mailed on January 3, 1954).

On January 15, 1954, plaintiff's appraiser wrote a letter to defendant's appraiser suggesting that they arrange to meet (35-36). That letter was received on January 17, 1954 (33).[2]

On January 22, 1954, plaintiff filed this action.

Under the terms of the policy, the appraisers must first select an umpire and are given 15 days to do so. On January 27, 1954 (within that 15 day period), defendant's appraiser telephoned plaintiff's appraiser for the purpose of arranging a meeting (34). For reasons of health as well as because of the weather, plaintiff's appraiser declined to do so (34).

On February 23, 1954, plaintiff's appraiser wrote another letter to defendant's appraiser requesting that the appraisal be further postponed (36).

On February 25, 1954, defendant's appraiser in turn wrote to plaintiff's appraiser requesting him to let him know when he would be ready to proceed (37).[3]

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[2]Although plaintiff seeks to convey the impression that the letter specifically stated that the appraiser would be available on any day of the next week (January 18 to January 22) for "consummating said appraisal", the letter did nothing of the sort. It merely stated when the appraiser would be available on weekdays (before 8 A.M. and after 5 P.M.) and when he would be available on Saturdays and Sundays (at any time) (36).

[3]As of October 4, 1954, when he executed an affidavit in support of the motion for summary judgment, defendant's appraiser had not been contacted by plaintiff's appraiser (34).

On March 16, 1954, after this action had been removed to the District Court of the United States, an answer was filed by defendant (7-13).

On September 21, 1954, plaintiff asked one of the judges of the Superior Court of the State of California, in and for the County of Shasta, to appoint an umpire (38-39).

On September 22, 1954, the umpire was appointed (40).

On October 25, 1954, defendant filed the motion for summary judgment which was ultimately granted by the District Court. At that time, there still had been no appraisal of the loss.

On January 4, 1955, the appraisal finally took place (60) and, on or about March 29, 1955, the award of the appraisers was filed with defendant (57). On the same day, plaintiff filed his motion for leave to file a supplemental complaint (54-63).

Summary judgment was granted on the sole ground that an apprasial of the loss was a condition precedent to plaintiff's right to recover under the policy.

On this appeal, plaintiff contends not only that an appraisal was not a condition precedent to recovery but also that, if it was such a condition, the requirement was waived by defendant.

Plaintiff also contends that an estoppel arose and that, in any event, he should have been allowed to file a supplemental complaint to show that the appraisal was completed in 1955.

Plaintiff argues of course that a number of genuine issues of fact remain in the case.

Finally, there is one other contention which pervades all of plaintiff's brief, namely, the highly emotional contention that this is just another case in which a big insurance company is taking advantage of a little policy holder and, by a series of dilatory tactics, is seeking to entrap him and defeat his just claim.

Our position is that an appraisal of the loss *was* a condition precedent to recovery, that there was no waiver and no estoppel and that leave to file a supplemental complaint was properly denied.

As far as other genuine issues of fact are concerned, it may be that such issues would arise in the case if the motion for summary judgment were decided adversely to defendant. This does not mean, however, that there should be a trial of those issues even though the entire case can be disposed of as a matter of law and in defendant's favor on the one issue raised by its motion.

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## SUMMARY OF THE ARGUMENT.

(1) Plaintiff alone was responsible for his failure to comply with the appraisal clause. None of the delay was caused by defendant. All of it was caused by plaintiff.

(2) Under those circumstances, compliance with the appraisal clause was a condition precedent to plaintiff's right to sue.

(3) Defendant did not waive its right to demand an appraisal.

(4) Nor was it estopped from insisting upon compliance with the appraisal clause.

(5) Leave to file a supplemental complaint was properly denied as the original complaint failed to state a cause of action.

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## ARGUMENT.

The policy involved in this action is a California standard form fire insurance policy. Its terms, which are statutory, are found in Section 2071 of the Insurance Code of the State of California. As far as material to this action, it provides as follows:

> "Appraisal
>
> "In case the insured and this company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then, on request of the insured or this company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing,

so itemized, of any two when filed with this company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally."

. . . . .

"Suit

"No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been compiled with, and unless commenced within 12 months next after inception of the loss."

Prior to 1950, Section 2071 of the Insurance Code contained substantially different appraisal provisions. Because some of the cases upon which plaintiff relies arose before 1950, we quote those provisions at length in the margin.[4]

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[4]"*Ascertainment of amount of loss.* This company shall be deemed to have assented to the amount of the loss claimed by the insured in his preliminary proof of loss, unless within twenty days after the receipt thereof, or, if verified amendments have been requested, within twenty days after their receipt, or within twenty days after the receipt of an affidavit that the insured is unable to furnish such amendments, the company shall notify the insured in writing of its partial or total disagreement with the amount of loss claimed by him and shall also notify him in writing of the amount of loss, if any, the company admits on each of the different articles or properties set forth in the preliminary proof or amendments thereto.

"If the insured and this company fail to agree, in whole or in part, as to the amount of loss within ten days after such notification, this company shall forthwith demand in writing an appraisement of the loss or part of loss as to which there is a disagreement and shall name a competent and disinterested appraiser, and the insured within five days after receipt of such demand

Under Section 2071 as it now reads, both the policy holder and the insurance company may demand an appraisal. Prior to 1950, only the company had that right.

Under the old law, demand for an appraisal had to be made (by the company) within a specified period of time and the appraisal itself had to be completed within another specified period of time (unless delayed by the policy holder). As it now reads, however, Section 2071 specifies neither when demand for the appraisal must be made nor when the appraisal must be completed (except of course that it must be completed before suit is filed).

It may also be noted that, under the old law, the company was required to notify the policy holder in writing and within a specified period of time if it disagreed with the amount of the loss claimed by him

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and name, shall appoint a competent and disinterested appraiser and notify the company thereof in writing, and the two so chosen shall before commencing the appraisement, select a competent and disinterested umpire.

"The appraisers together shall estimate and appraise the loss or part of loss as to which there is a disagreement, stating separately the sound value and damage, and if they fail to agree they shall submit their differences to the umpire, and the award in writing duly verified of any two shall determine the amount or amounts of such loss.

"The parties to the appraisement shall pay the appraisers respectively appointed by them and shall bear equally the expense of the appraisement and the charges of the umpire.

"If for any reason not attributable to the insured, or to the appraiser appointed by him, an appraisement is not had and completed within ninety days after said preliminary proof of loss is received by this company, the insured is not to be prejudiced by the failure to make an appraisement, and may prove the amount of his loss in an action brought without such appraisement." (Stats, 1935, ch. 145, p. 600).

in his proof of loss. As it now reads, Section 2071 contains no such requirement.

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### (1) PLAINTIFF ALONE WAS RESPONSIBLE FOR HIS FAILURE TO COMPLY WITH THE APPRAISAL CLAUSE.

At least as early as May 7, 1953 (more than eight months prior to the expiration of the one-year period of limitation), plaintiff was represented by attorneys. Hence, it is preposterous to suggest that he was taken advantage of or entrapped.

We resent the charge that defendant sought to take advantage of or entrap plaintiff. But that is not the point. The point is simply that insurance companies have rights too.

It must be remembered that the policy issued to plaintiff was a statutory form of policy imposed by law upon defendant as well as plaintiff and not merely a contract between them. Its terms were *not* selected by defendant and then imposed upon plaintiff on a take it or leave it basis. On the contrary, defendant had no choice about them either.

This may not be the place to argue their wisdom but we do want to make it clear that we, at least, consider them very wise.

It is a matter of common knowledge of which we assume that this court can take judicial notice that policies of fire insurance on residential property are generally issued without an inspection of the insured premises. Concededly, they could be inspected but,

if they were, the cost of fire insurance would be much higher to all policy holders and, as to most of them, the expense of inspection and appraisal before issuance of the policy would be unnecessarily incurred since they would never have occasion to make a claim under their policy.

Instead of demanding ahead of time all of the information which they may need in the event of a fire as to all of the buildings which they insured, and thereby unnecessarily increasing the cost of insurance to all policy holders, insurance companies accordingly demand such information only as to buildings that were damaged or destroyed by fire.

That is why, however, the Insurance Code provides that, as to those buildings, insurance companies shall be entitled to immediate and detailed information. That is why the statutory form of policy requires the insured to give immediate notice of a loss to the company, requires him thereafter to file a sworn proof of loss and to submit to an examination under oath, if one is demanded by the company, and finally requires him to submit to (as well as giving him the right himself to insist upon) an appraisal of the amount of his loss.[5]

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[5]The complete provisions of the policy as to those requirements are as follows:

"Requirements in case loss occurs

"The insured shall give written notice to his company of any loss without unnecessary delay, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual

That is the only way in which an insurance company (and all of its other policy holders) can be protected against fraudulent or inflated claims.[6]

Needless to say, the foregoing provisions of the policy are particularly important in a case (such as this case) in which the insured premises as well as their contents were completely destroyed by fire for, in such a case, little, if any, information can be ob-

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cash value and amount of loss claimed; and within 60 days after the loss, unless such time is extended in writing by this company, the insured shall render to this company a proof of loss signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required and obtainable, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost at such reasonable time and place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

[6]The policy expressly provides that it shall be void in the event of any fraud or false swearing by the insured, whether before or after the fire. In other words, it contemplates not only that the insured shall furnish all of the necessary information under oath

tained by inspecting the premises themselves after the fire. All that can be appraised is the information made available by the policy holder.

Although plaintiff seemingly contends otherwise, it is clear that an insurance company may insist upon a sworn proof of loss *and* an examination under oath *and* an appraisal and need not be satisfied with less. Moreover, since an examination under oath is obviously intended to amplify the information contained in a sworn proof of loss, it is also clear that such an examination need not be requested until after a proof of loss has been filed.

Similarly, since an appraisal obviously can be had (particularly in the case of premises that were completely destroyed by fire) only after the information on which it will be based has been furnished to the company, it is again clear that an appraisal need not be demanded until after the insured has filed a proof of loss and has been examined under oath.

It is thus apparent that, in this case, defendant was fully justified in not asking for an appraisal earlier than it did. In fact, it could have waited not only until January 7, 1954, when plaintiff submitted to an examination under oath, but until January 13, 1954, when plaintiff finally submitted his amended proof of loss.

Because time had become very short when plaintiff finally indicated his willingness to comply with the

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but also that the insurance company will check that information before paying a loss and that it will not have to pay if the information turns out to have been false or fraudulent.

requirements of the policy, defendant asked for an appraisal on December 23, 1953, without waiting for all of the information to which it was entitled.

If, as a result of the examination under oath, defendant would conclude that an appraisal was unnecessary, it could always advise plaintiff accordingly. If, however, an appraisal still appeared necessary, defendant could at least not be accused of having asked for it too late.

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Defendant is not responsible and is not to be held responsible for the delay resulting from plaintiff's refusal to submit to an examination under oath in May of 1953. Plaintiff then took the position that he did not have to submit to such an examination. The Superior Court of the State of California, in and for the County of Shasta, ruled, however, that he should have submitted thereto and its judgment has long since become final.

Plaintiff seemingly contends that the trial judge in the Shasta action was in error in granting the nonsuit and, at the same time, seems to attach some significance to the fact that he himself consented thereto. Needless to say, since the judgment of nonsuit has become final, it makes no difference whether it was erroneous or not. In fact, however, it was entirely proper. With or without plaintiff's consent, the trial judge had no choice but to grant a nonsuit

because of plaintiff's failure to submit to an examination under oath.[7]

> *Hickman v. London Assurance Corp.*, 184 Cal. 524, 195 Pac. 45;
>
> *Robinson v. National Auto. etc., Ins. Co.*, 132 Cal. App. 2d 709, 714, 282 P. 2d 930.

Plaintiff also blames defendant for the delay of 47 days which followed the granting of the nonsuit. The law is clear, however, that, having once fixed a date for an examination under oath which plaintiff failed to attend, defendant was under no obligation to do anything further about the matter. On the contrary, it was incumbent upon plaintiff, when he decided that he would submit to an examination after all, to notify defendant accordingly.

> *Hickman v. London Assurance Corp.*, 184 Cal. 524, 533-534, 195 Pac. 45;
>
> *Bergeron v. Employers' Fire Ins. Co.*, 115 Cal. App. 672, 676, 2 P. 2d 453.

This, he did, but only 47 days after the nonsuit.

Moreover, plaintiff could not only have avoided the delay by submitting to an examination under oath on May 7, 1953, he could have demanded an appraisal himself.

In this case, all of the delay was caused by plaintiff. He succeeded in postponing his examination under oath for approximately eight months thereby making

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[7]In fact, it may well be that, if any one was prejudiced by the granting of the nonsuit, it was defendant and not plaintiff, since defendant may well have been entitled to a nonsuit with rather than without prejudice.

it far more difficult for defendant to check the accuracy of his answers. He similarly succeeded in delaying an appraisal so that the award of the appraisers is certain to be far less reliable than it would have been had it been made in May or June of 1953.

An insurance company is entitled to adjust a claim before it becomes stale, before all of the witnesses are scattered and before it has become impossible to determine, because of the lapse of time, whether the values which the policy holder placed upon his property were inflated.

Thus, if any one was irretrievably prejudiced by the delay in this case, it is defendant and not plaintiff.

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Plaintiff places great reliance upon *Bollinger v. National Fire Insurance Company,* 25 Cal. 2d 399, 154 P. 2d 399. That case, however, is altogether distinguishable.

Plaintiff would have this court believe that the issue in that case was the same as that raised in this case (namely, whether the action was premature because of the plaintiff's failure to comply with a condition precedent). Such is not the case. The *Bollinger* case did *not* hold (as plaintiff contends) that the insured could proceed with his action notwithstanding his failure to comply with a condition precedent. It merely held that, under the particular circumstances of that case, the insurance company could not rely on the one year statute of limitation provided for in the policy.

To clarify the distinction, the facts in the *Bollinger* case should be briefly outlined. Bollinger first filed suit on his policy in a municipal court where the action was dismissed because it had been brought less than thirty days after the fire (the policy providing that action could not be brought until thirty days after the fire). Bollinger then filed suit in the Superior Court and that action was in turn dismissed because it had been brought more than one year after the fire.

On appeal, the judgment of the Superior Court was reversed, the Supreme Court holding that the insurance company could not rely on the one year period of limitation because:

(1) The first action in fact had not been prematurely brought, and

(2) In any event, the insurance company had caused the plaintiff's failure to file the second action in time (more than 30 days and less than one year after the fire) by delaying the trial of the first action and not raising the defense of its prematurity until after the one year period had run.

In other words, the court held that equitable considerations (the insurance company's repeated requests for continuances of the trial of the first action without raising its defense to that action) made the statute of limitation inapplicable.

In this case, the situation is entirely different. None of the delay was caused by defendant. All of it was caused by plaintiff.

If the summary judgment is affirmed and if plaintiff files another action and if he is then met with the defense of the statute of limitations, it will then be time enough for him to rely on the *Bollinger* case and for this court (or any other court) to determine whether his reliance on that case is justified. In this action, however, the *Bollinger* case is simply not in point.

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**(2) COMPLIANCE WITH THE APPRAISAL CLAUSE WAS A CONDITION PRECEDENT TO PLAINTIFF'S RIGHT TO SUE.**

The rule is settled in California that, when demanded, an appraisal of the loss is a condition precedent to the policy holder's right to sue.

> *Old Saucelito L. & D.D. Co. v. C.U.A. Co.,* 66 Cal. 253, 5 Pac. 232;
>
> *Adams v. Insurance Companies,* 70 Cal. 198, 11 Pac. 627;
>
> *Hyland v. Millers Nat. Ins. Co.* (C.C.A. 9), 91 F. 2d 735, 738.

Plaintiff contends, however, that an appraisal of the loss was not a condition precedent to recovery in this case (1) because the appraisal clause can be invoked only when the parties have failed to agree as to the actual cash value or as to the amount of the loss and, so plaintiff contends, there was no showing of any such disagreement in this case and (2) because the demand for an appraisal was made so late that it could not be completed within the twelve month period of limitation contained in the policy.

We cannot believe that plaintiff is serious about his first contention. The very fact that an appraisal was demanded is proof enough that the parties failed to agree as to the actual cash value or the amount of the loss (particularly since there is no specific requirement in the standard form of policy, as there was before 1950, that the company notify the insured in writing of its disagreement with the amount of loss claimed by him).

In fact, there probably was a sufficient disagreement to justify a demand for an appraisal *by plaintiff* as soon as defendant rejected his proof of loss (April 30, 1953). Be that as it may, however, disagreement was certainly sufficiently expressed by defendant when it demanded the appraisal.

Thus, the real issue is that raised by plaintiff's second contention, namely, that the demand for an appraisal was made too late.

As to that contention, our position is simply that defendant was not required to demand an appraisal until plaintiff had submitted to an examination under oath and had thus made available to defendant the information which would be needed for an appraisal.

Hence, the appraisal, which would have been a condition precedent to recovery had demand therefor been made in May of 1953, continued to be such a condition precedent even though demand therefor was made 32 days before the expiration of the 12 month period of limitation contained in the policy.

To hold (as plaintiff would have this court hold) that compliance with the appraisal clause was not a condition precedent in this case would enable policy holders who do not wish their property appraised to avoid an appraisal by the simple device of delaying submission to an examination under oath.

Plaintiff also contends that compliance with the appraisal clause ceased to be a condition precedent because he did everything within his power to have the appraisal completed within the limitation period. Specifically, plaintiff contends that it could have been completed between January 18 and January 22, 1954, and that defendant is responsible for the failure to complete it during that period.

Once it is remembered, however, that plaintiff himself took one week (from January 6 to January 13, 1954) to select his own appraiser and that the policy gave the appraisers fifteen days to appoint an umpire, it becomes immediately apparent that plaintiff's contention is untenable. If it were well taken, it would simply mean that, by delaying his examination under oath for a sufficiently long period of time and, after an appraisal was demanded, by taking long enough to appoint his own appraiser, the policy holder could speed up the appraisal in such a way as to deprive the insurance company of rights to which it would normally be entitled under the policy.

From May 1, 1953, until January 17, 1954, the delay was exclusively that of plaintiff. Being solely responsible for the fact that the 15 day period for the

appointment of the umpire did not start until January 18, 1954, plaintiff cannot complain of the fact that the umpire was not appointed on the first or second or third or fourth or fifth day of that period.[8]

We have no quarrel with plaintiff's contention that the two conditions of the suit clause of the policy (that all conditions precedent shall have been complied with and that suit be brought within 12 months) must be so coordinated that the insurer's insistence upon one condition will not prevent compliance with the other. We believe indeed that the insured should not be made to suffer from a delay for which the insurer is responsible. In this case, however, it appears as a matter of law that plaintiff and plaintiff alone was responsible for the delay.[9]

The cases cited by plaintiff are all distinguishable.

*Koyer v. Detroit F. & M. Ins. Co.*, 9 Cal. 2d 336, 70 P. 2d 927, upon which plaintiff primarily relies, was decided while the standard form of fire policy

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[8]We realize that whatever happened after this action was filed is not relevant to the question of whether plaintiff was entitled to file it on January 22, 1954. It may be noted, however, that, after defendant's appraiser contacted plaintiff's appraiser on January 27, 1954, the latter delayed the appraisal for almost another year.

[9]On page 25 of plaintiff's brief, the following appears:

> "The policy can not be construed to permit the insurers to so delay the exercise of any requirement of the policy as to put the insured in a position where he cannot enforce his right to recover under the policy."

Under the facts of this case, that sentence may well be paraphrased as follows: the policy cannot be construed to permit the insured to so delay the exercise of any requirement of the policy (examination under oath) as to put the insurer in a position where it cannot enforce another of its rights under the policy (appraisal).

still required that the appraisal be completed within 90 days after the filing of a proof of loss (unless it was delayed by the policy holder).

Appraisers were appointed in that case but the appraisal was not completed within the 90 day period and the policy holder filed suit without waiting for its completion. The court upheld his right to sue because the delay was attributable neither to him nor to his appraiser.

In this case, however, the delay was attributable exclusively to plaintiff. Moreover, now that Section 2071 has been amended (a fact which plaintiff does *not* mention in his brief), the *Koyer* case is in any event inapplicable.

*Aetna Insurance Co. v. Hefferlin,* 260 Fed. 695, is similarly distinguishable. In that case, which arose under Montana law, the appraisal had been completed but the plaintiff sought to recover damages in excess of the amount awarded him by the appraisers. This court held (1) that the plaintiff was not bound by the award because the appraisers had failed to consider certain items of property which they should have considered and (2) that the plaintiff did not have to submit to a second appraisal since the first one (in which he had participated in good faith) had failed without fault on his part. In this case, however, plaintiff and plaintiff alone was responsible for the failure to complete the appraisal.

*Covey v. National Union Fire Ins. Co.,* 31 Cal. App. 579, 161 Pac. 35, is another case which arose under

a different form of policy. In addition to a ninety day completion clause, the policy involved in that case also contained specific provisions as to when an appraisal should be *demanded* by the company.

Demand was not made within the prescribed period. In fact, it was not received by the policy holder until after the expiration of the 90 day period within which the appraisal should have been completed. Under those circumstances, the court held of course that the policy holder did not have to submit to an appraisal.

In this case, however, the demand for an appraisal was made at the earliest possible time, namely, as soon as plaintiff had agreed to make available to defendant (by way of a *complete* examination under oath) the information which defendant was entitled to have before proceeding with an appraisal.

---

### (3) DEFENDANT DID NOT WAIVE ITS RIGHT TO DEMAND AN APPRAISAL.

Plaintiff next contends that defendant waived its right to an appraisal by unconditionally denying liability under the policy.

The simple answer to that contention is that defendant never *unconditionally* denied liability.

It is true that, after the filing of the first action, defendant included a general denial of liability in its answer to the complaint, thus putting plaintiff to his proof. *Before the filing of that action,* however, defendant had expressly advised plaintiff that its re-

quest for further proofs of loss and for an examination under oath should be construed as *neither an admission nor a denial of liability.* When the action was filed, therefore, there had been no waiver by defendant of any condition precedent.

It is only a denial *before* the filing of an action (and, as we shall show, not even every such denial) that can operate as a waiver. Although we found no California case on the subject, the distinction between the effect of a denial of liability *before suit* and the effect of a denial *after suit* is clear. See the cases cited at pages 415-416 of the comprehensive annotation in 3 ALR 2d 383. Those cases squarely hold that a denial of liability which first appears in the answer of the insurance company is not such a denial as will amount to a waiver of the appraisal clause.

If plaintiff's contention were sound, the way would be open for a policy holder to bypass all of the requirements of the statutory form of fire policy. All that he would have to do to avoid filing a proof of loss or submitting to an examination under oath or an appraisal would be to file suit immediately after the fire. The insurance company would of course have to plead that, under such circumstances, there was no liability on its part and the policy holder would then be in a position to contend that all conditions precedent included in the policy had been waived. A better example of trying to lift one's self by one's boot straps could hardly be imagined.

After the filing of the first action, defendant had no choice but to include a general denial in its an-

swer. If the conditions with which plaintiff had failed to comply were truly conditions precedent, there was indeed no liability upon defendant's part.

Moreover, it is not the law, as plaintiff would have this court believe, that an insurance company can insist upon an appraisal only when it otherwise admits liability and the only issue between the parties is that of the amount of the loss. There are numerous situations in which more than one defense is available to the insurance company and in which it can deny liability *before* suit is filed and yet insist upon an appraisal of the loss.

To operate as a waiver, a denial of liability must be based upon the claimed invalidity of the policy (or a want of coverage or a forfeiture). As is made clear in the annotation to which we just referred (3 ALR 2d 383, 415-416), the insurance company cannot at the same time claim (1) that there never was a policy (or that it was cancelled or forfeited before the fire) and (2) that it is nevertheless entitled to rely upon a clause of the policy.

This is a far cry from the rule which plaintiff would have this court adopt and under which an insurance company could rely on an appraisal clause only if it relies on nothing else and waives every other defense that it may have under the policy.

If plaintiff were right, an insurance company which has reason to believe that the policy holder set the fire himself could insist upon an appraisal only at the price of waiving its right to show (or try to show)

that he set the fire. It is obvious that such a rule would be unsound and that the insurance company *can* rely on both defenses. (See, for example, *Hyland v. Millers Nat. Ins. Co.*, 91 F. 2d 735, a case decided by this court and in which the insurance company prevailed both because of the policy holder's failure to submit to an appraisal and because of fraud and false swearing on his part in his proof of loss).

In this case, defendant never took the position (not even in its answer to the complaint) that the policy was invalid or that it had been cancelled or forfeited before the fire. The only defenses upon which it relied and on the basis of which it denied liability after suit was filed were defenses *under the policy.* It cannot be held therefore that it is precluded by a "denial of liability" from relying on the appraisal clause.

The case of *Jacobs v. Farmers' Mut. Fire Ins. Co.*, 5 Cal. App. 2d 1, 41 P. 2d 960, upon which plaintiff relies, is altogether distinguishable. In reversing a judgment in favor of the policy holder, the court indicated by way of dictum that, on a retrial of the case, the insurance company could not rely on the appraisal clause of the policy. The court gave various reasons in support of that dictum including the following:

(1) The amount of damages claimed by the policy holder was not disputed. In this case, it was.

(2) No demand for an appraisal had been made by the insurance company; in this case, demand was made.

(3) The insurance company did not plead the plaintiff's failure to submit to an appraisal; in this case, such failure was pleaded.

(4) The insurance company had denied liability before suit was filed on the ground, among others, that the policy had become void before the fire; in this case, there was no denial of liability before suit was filed and, even thereafter, the denial was limited to policy defenses.

---

Plaintiff also contends that defendant waived its right to ask for an appraisal by not raising plaintiff's failure to submit thereto as a defense in the first action.

If we are right, however, as we believe that we are, in our contention that defendant did not have to ask for an appraisal until such time as plaintiff submitted to an examination under oath, it automatically follows that, at the time when the answer to the first complaint was filed, plaintiff had not yet "failed" to submit to an appraisal and his "failure" to submit thereto could accordingly not yet be relied upon as a defense.

Moreover, since waiver is the intentional relinquishment of a known right with full knowledge of all the facts (see *Wienke v. Rich,* 179 Cal. 220, 176 Pac. 42), there could be no waiver of defendant's right to ask for an appraisal at a time when defendant did not

have the information on the basis of which it could decide whether to ask for an appraisal or not.

Plaintiff places some reliance upon *Landreth v. South Coast Rock Co.,* 136 Cal. App. 457, 29 P. 2d 225, and *Pneucrete v. U.S. Fidelity & G. Co.,* 7 Cal. App. 2d 733, 46 P. 2d 1000. Both cases (neither of which involved a policy of insurance) are distinguishable.

In the *Landreth* case, a judgment for the plaintiff was affirmed on appeal as against the defendant's contention that the dispute should first have been submitted to arbitration as provided in the contract. The court pointed out that, although the defendant had pleaded the agreement to arbitrate, it had taken no steps to procure an arbitration and had tried the case on its merits without urging the agreement to arbitrate at the trial. This, the court held, amounted to a waiver of its right to insist upon arbitration.

In this case, however, the right to demand an appraisal had not yet arisen when defendant filed its answer in the Shasta action. Moreover, unlike the contract involved in the *Landreth* case, the policy in this case provided that suit could not be brought unless all conditions precedent had been complied with.

In the *Pneucrete* case, the court held that submission of the dispute to arbitration was unnecessary (because the action was brought on a statutory bond rather than on the contract which contained the arbitration clause) and that, in any event, the right to insist upon arbitration had been waived because of the defendant's failure to ask for it until the day

before the trial (22 months after it had filed an answer in which no mention of arbitration was made although the plaintiff's failure to arbitrate was then available as a defense).

---

### (4) THERE WAS NO ESTOPPEL.

Plaintiff next contends that defendant should have been estopped from relying upon his failure to comply with the appraisal clause as a defense.

It is not clear to us how it can be contended that an estoppel arose since it does not appear either that defendant caused plaintiff to change his position or that plaintiff in fact changed his position.

It would seem, however, that this section of plaintiff's brief is merely a restatement of his arguments on the subject of waiver coupled with a restatement of his contention that the policy holder is the one to decide when sufficient information has been furnished to the insurance company and a restatement of his basic contention that it would be unconscionable to allow defendant to "take advantage" of him.

For example, on page 31, plaintiff argues that, although defendant "had full knowledge of all necessary facts", it nevertheless presented its dilatory objections piecemeal, raising one and, when that one had spent its course, raising another. In effect, however, this is merely another way of saying that defendant did not have the right to ask for an examination under oath because it had already been given sufficient information.

Even though plaintiff took the position that "there is an end to this third degree some place" (27), the Superior Court of the State of California, in and for the County of Shasta, ruled that defendant was entitled to at least one examination under oath.

On page 32 of plaintiff's brief, defendant is accused of having sprung a trap upon plaintiff at the trial of the first action. Needless to say, there was no trap. But in any event, the trap, if any there was, was sprung in the answer which defendant filed 3½ months before the trial of the first action and not at the trial of that action. That answer specifically alleged that one of the defenses upon which defendant was relying was the failure of plaintiff to submit to an examination under oath (51).

On page 33 of his brief, plaintiff again complains of the fact that, although the nonsuit was granted on November 4, 1953, defendant did nothing about it until December 23, when it accepted plaintiff's offer to submit to an examination under oath and asked for an appraisal of the loss. We have already shown, however, that the duty rested upon plaintiff, if he wished to proceed with his claim under the policy, to notify defendant that he was now prepared to submit to an examination under oath (see *Bergeron v. Employers' Fire Ins. Co.,* 115 Cal. App. 672, 2 P. 2d 453).

Plaintiff argues further that it is but a natural inference that, at the time when defendant decided to ask for an appraisal, it knew that the appraisal could not be completed before the expiration of the

12 month period of limitations. Conversely, however, it is also a natural inference that plaintiff delayed submitting to an examination under oath until *he* knew that it would be too late for an appraisal should one be requested by defendant.

Finally, on page 35 of his brief, plaintiff seemingly complains of the fact that defendant did not postpone making its demand for an appraisal until after plaintiff had submitted to an examination under oath on January 7, 1954.

There is no doubt that defendant could have done so. Because it realized that time was short and because it wanted to be fair, however, it demanded an appraisal as soon as it became certain that the information which was essential to an appraisal would finally be made available to it.

*Fitzpatrick v. North America Acc. Ins. Co.,* 18 Cal. App. 264, 123 Pac. 209, upon which plaintiff relies, supports defendant's rather than plaintiff's position. The case was decided in favor of the insurance company rather than in favor of the insured although the opinion does contain the language which plaintiff quotes on page 36 of his brief. That language was of course only dictum since, in the *Fitzpatrick* case as in this case, there was neither bad faith on the part of the insurance company nor any conduct that made it impossible for the policy holder to comply with the requirements of the policy.

*Amusement Syndicate Co. v. Prussian National Ins. Co.,* 85 Kan. 367, 116 Pac. 620, is also distinguishable. The insurance company in that case waited more than

one year (until after the filing of the action) to demand an appraisal. It could have demanded it soon after the fire, however, so that it, and not the policy holder, was responsible for the delay.

---

### (5) LEAVE TO FILE A SUPPLEMENTAL COMPLAINT WAS PROPERLY DENIED.

Since, as we have demonstrated, plaintiff had no cause of action when he filed suit on January 22, 1954, the District Court properly denied him leave to file his proposed supplemental complaint.

*Bonner v. Elizabeth Arden, Inc.,* (C.A. 2), 177 F. 2d 703, 705;

*Bowles v. Senderowitz* (U.S. D.C., E.D. Pennsylvania), 65 F. Supp. 548, 551, and *Porter v. Senderowitz* (C.C.A. 3), 158 F. 2d 435, 438;

*United States Pipe & Foundry Co. v. James B. Clow & Sons* (U.S. D.C., N.D. Alabama, S.D.), 145 F. Supp. 380.

Neither *Popovitch v. Kasperlik* (U.S. D.C., W.D. Pennsylvania), 76 F. Supp. 233, nor *Kimmel v. Yankee Lines* (U.S. D.C., W.D. Pennsylvania) 125 F. Supp. 702, affirmed in *Kimmel v. Yankee Lines* (C.A. 3), 224 F. 2d 644, which plaintiff cites, is in point.

In the *Popovitch* case, leave to file a supplemental complaint was denied. In the *Kimmel* case, a supplemental answer was allowed but there was no question as to the sufficiency of the original answer.

## CONCLUSION.

Compliance with the appraisal clause was a condition precedent to plaintiff's right to sue.

There was no waiver, no estoppel, no dilatory tactics (except plaintiff's) and no entrapment.

Finally, leave to file a supplemental complaint was properly denied.

Both the judgment and the order appealed from should accordingly be affirmed.

Dated, San Francisco, California,
February 20, 1957.

Respectfully submitted,

HAUERKEN, ST. CLAIR & VIADRO,
GEORGE H. HAUERKEN,
KENNEDY & CALDWELL,
*Attorneys for Appellees.*

No. 15236

# United States Court of Appeals

for the Ninth Circuit

BURTON E. CARR and MARIE A. CARR,

Appellants.

vs.

CITY OF ANCHORAGE, a Corporation,

Appellee.

# Transcript of Record

**Appeal from the District Court for the District of Alaska**
**Third Division**

FILED
DEC - 3 1956
PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-16-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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## NAMES AND ADDRESSES OF COUNSEL

BELL, SANDERS & TALLMAN, By
JAMES K. TALLMAN,
Central Bldg.,
Anchorage, Alaska,

For the Appellants.

JAMES M. FITZGERALD,
City Attorney;
L. EUGENE WILLIAMS,
City Hall,
Anchorage, Alaska,

For the Appellee.

In the District Court for the District of Alaska,
Third Division

No. A-11,887

BURTON E. CARR AND MARIE A. CARR,
Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corporation,
Defendant.

COMPLAINT

Come now the above-named Plaintiffs and for their cause of action against the Defendant, allege and state as follows:

I.

That the City of Anchorage is a municipal corporation organized and existing under and by virtue of the laws of the Territory of Alaska and of the United States of America.

II.

That on or about the 15th day of May, 1950, these Plaintiffs owned a piece of property located at the corner of Fifth Avenue and Denali, which the legal description thereof was:

> Lot One (1), Block Twenty (20), East Addition to the City of Anchorage, Alaska, according to the recorded plat thereof.

III.

That on or about May 15, 1950, the Defendant, acting through its duly elected, qualified and acting counsel, in a regular meeting thereof, unanimously promised these Plaintiffs that if they would cut the foundation off on a building they were commencing to build and move the building back, they would pay the cost of cutting off the foundation and building it back farther on the lot so that the City could take ten feet of the front of said lot, by condemnation, for the purpose of widening the street, and for sidewalk purposes.

IV.

That these Plaintiffs believed the counsel of the City of Anchorage, agreed with said City of Anchorage that they would cut their foundation off in front and extend it at the back, and relying thereon, did cut said foundation off in front and build the buildings back on said lot, twelve feet, and as a result thereof, they became obligated and bound to pay for the cutting off of said foundation and the extra work required to do so, to the extent of $4,051.84. This sum being made up by an estimate which was furnished by Victor Gottberg and accepted by these Plaintiffs, whereby the cutting off of the foundation and rebuilding at the back would be performed for $2,542.00. But, when the work was done it required the changing of the heating plant from the surface level of the building to a special place in the basement and as extra work these Plaintiffs paid the difference between $2,542.00

and $4,051.48 for the extra work and material required, which made a total cost paid of $4,051.48.

V.

Plaintiffs further allege that the defendant has failed, neglected and refused to pay said sum or any part thereof and are therefore justly indebted to these Plaintiffs in the sum of $4,051.48, together with interest thereon at the rate of 6% per annum from the 1st day of August, 1950, at the time the account became due and payable.

Wherefore, Plaintiffs pray judgment against the Defendant, City of Anchorage, a municipal corporation, for the sum of $4,051.48, together with interest thereon at the rate of 6% per annum from the 1st day of August, 1950, and for costs of this action, including a reasonable sum as attorney's fees.

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL,
Of Attorneys for Plaintiffs.

Duly verified.

[Endorsed]: Filed February 7, 1956.

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[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now the defendant, by and through its attorney, Lynn W. Kirkland, and moves this Honorable Court dismiss the above-entitled action on

the grounds and for the reason that the complaint on file herein does not state a claim upon which relief can be granted.

Dated at Anchorage, Alaska, the 5th day of March, 1956.

/s/ LYNN W. KIRKLAND,
Attorney for the Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 5, 1956.

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[Title of District Court and Cause.]

## HEARING ON MOTION TO DISMISS

Now at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now at this time Hearing on Motion to Dismiss in cause No. A-11,887, entitled Burton E. Carr and Marie A. Carr, plaintiffs, versus City of Anchorage, a Municipal corporation, defendant, came on regularly before the Court, plaintiff represented by Bailey E. Bell, of counsel, defendant represented by L. W. Kirkland, City Attorney, the following proceedings were had, to wit:

Argument to the Court was had by L. W. Kirkland, for and in behalf of the defendant.

Argument to the Court was had by Bailey E. Bell, for and in behalf of the plaintiff.

Whereupon, Court having heard the arguments of respective counsel and being fully and duly advised in the premises, plaintiff given ten (10) days within which to file brief; defendant given ten (10) days thereafter within which to file answering brief.

Entered March 16, 1956.

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[Title of District Court and Cause.]

## ANSWER

Comes Now the defendant herein and answers the complaint on file as follows:

I.

The defendant admits each and every allegation contained in paragraph I of the plaintiff's complaint herein.

II.

The defendant is without sufficient information to answer paragraph II of the complaint on file herein, and therefore, on information and belief denies the allegations contained therein.

III.

The defendant denies each and every allegation contained in paragraphs III and IV of the plaintiffs' complaint.

For a First and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That the contract as alleged in the plaintiffs' complaint is beyond the scope of the power of this defendant to contract and, therefore, said contract is void and unenforceable.

For a Second and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That the contract as alleged in the plaintiffs' complaint was not entered into as provided by Section 105, Chapter 2 of the Anchorage General Code, which section requires all contracts to be approved by the City Council, signed by the Mayor or City Manager, attested to by the City Clerk, approved as to substance by the City Manager and approved as to form by the City Attorney, and therefore the alleged contract is void and unenforceable.

For a Third and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That there is no record in the minutes of the City Council meetings, as required by Section 16-1-63, ACLA 1949, whereby the City Council has obligated the City to pay the plaintiffs as alleged in

their complaint; therefore, this contract is void and unenforceable.

For a Fourth and Separate Defense Against the Plaintiffs Herein the Defendant Alleges as Follows:

I.

That there is no record in the minutes of the meetings of the City Council of any vote by said Council, as provided in Section 16-1-40, ACLA 1949, obligating the City to pay these plaintiffs as alleged in their complaint, and, therefore, said contract is unenforceable and void.

Wherefore, having answered the complaint of the plaintiffs filed herein, the defendant prays that the plaintiffs take nothing by virtue of the same and that the defendant be reimbursed for costs and expenses herein incurred, including reasonable attorney's fees, and for such other relief as the court may deem just and equitable in the premises.

/s/ LYNN W. KIRKLAND,
Attorney for the Defendant,
City of Anchorage.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1956.

[Title of District Court and Cause.]

## MOTION TO STRIKE FROM ANSWER

Come Now the Plaintiffs, Burton E. Carr and Marie A. Carr, and move the Court to strike from the Answer of the Defendant the second and separate affirmative defense as well as the third and separate affirmative defense and the fourth and separate affirmative defense; for the reason that they are surplusage, prejudicial, and the allegations therein states no defense to the Plaintiff's cause of action.

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL,

Of Attorneys for Plaintiff.

To comply with the rule of the Court, requiring the movant to state the reasons and grounds of their motion, we contend as follows:

That Section 105, Chapter 2 of the Anchorage General Code has no application at all here, and only provides one method and for one form of a contract, but has no effect on the oral contract sued on herein.

That the third and separate defense cannot be pleaded. The City Council cannot plead as a defense to the Plaintiffs' cause of action their failure to keep proper records, which they are required to do by law, and the failure so to do would not effect these Plaintiffs' right, and they would be estopped in pais from pleading this separate defense.

As to the fourth and separate defense, the same thing applies to it as does to the third separate defense.

Respectfully submitted,

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL

Of Attorneys for the Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed April 18, 1956.

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[Title of District Court and Cause.]

## NOTICE OF MOTION FOR SUMMARY JUDGMENT

To: Bailey E. Bell of the firm of Bell, Sanders & Tallman, Attorneys for the Plaintiffs.

Please Take Notice that the undersigned will bring the attached Motion for Summary Judgment on for hearing before the Honorable J. L. McCarrey, Jr., in the Federal Building at Anchorage, Alaska, on the 4th day of May, 1956, at 10:00 o'clock a.m., or as soon thereafter as counsel can be heard, and that this motion will be submitted upon the pleadings and admissions on file.

Dated at Anchorage, Alaska, the 11th day of April, 1956.

/s/ LYNN W. KIRKLAND,

Attorney for the Defendant, City of Anchorage.

[Title of District Court and Cause.]

## MOTION FOR SUMMARY JUDGMENT

The defendant, City of Anchorage, by and through its attorney, Lynn W. Kirkland, hereby moves this court to enter a summary judgment for the defendant in accordance with the provisions of Rule 56 (b) and (c), Federal Rules of Civil Procedure, on the ground that the pleadings and affidavit hereto attached and marked Exhibit A and Exhibit B show that the defendant is entitled to a judgment as a matter of law.

Dated at Anchorage, Alaska, the 11th day of April, 1956.

/s/ LYNN W. KIRKLAND,
Attorney for the Defendant,
City of Anchorage.

[Title of District Court and Cause.]

## AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

United States of America,
Territory of Alaska—ss.

I, B. W. Boeke, being first duly sworn, depose and say:

That I am the City Clerk for the City of Anchorage, Alaska, and have held said position for a

period of nine years; that I have personal knowledge of the facts herein set forth; that this affidavit is submitted in support of defendant's Motion for Summary Judgment herein for the purpose of showing that there is in this action no genuine issue as to any material fact and that the defendant is entitled to a judgment as a matter of law; that I am over the age of 21 years and am competent to be a witness in this cause.

That as a part of my duties as City Clerk for the City of Anchorage, Alaska, I am the keeper of the records and documents, including the records of the City Council meetings; that after a diligent search I am unable to find any record in the minutes of the City Council meetings whereby the City Council has agreed to pay the plaintiffs as alleged in their complaint; nor is there any record in the minutes of the City Council meetings or in any other document on file in the City Clerk's office whereby the Mayor or City Manager has signed any agreement to pay as alleged in the plaintiff's complaint; nor is there any record that the City Clerk has attested any document which obligates the City to pay as set forth in the plaintiffs' complaint to this cause; nor is there any record that any agreement as alleged in the plaintiffs' complaint has been approved as to substance by the City Manager and approved as to form by the City Attorney; nor is there any record in the minutes of the City Council meetings whereby a vote has been taken by the City Council obligating the City to pay money to the plaintiffs as stated in the complaint to this cause.

Further affiant sayeth not.

/s/ B. W. BOEKE.

Subscribed and sworn to before me this 17th day of April, 1956.

[Seal] /s/ ERNEST P. LaBATE,
Notary Public in and for
Alaska.

My commission expires: 5/18/57.

Receipt of copy acknowledged.

[Endorsed]: Filed April 19, 1956.

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[Title of District Court and Cause.]

## OBJECTION TO MOTION FOR SUMMARY JUDGMENT

Come now the Plaintiffs above named, and object to the Court rendering judgment on the Motion filed herein, and support this objection with two affidavits—one of Burton E. Carr, and the other of Don Rozell.

Dated at Anchorage, Alaska, this 20th day of April, 1956.

BELL, SANDERS & TALLMAN,

By /s/ BAILEY E. BELL,
Of Attorneys for the
Plaintiffs.

[Title of District Court and Cause.]

## AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Burton E. Carr, being first duly sworn on oath, deposes and says that he has read the affidavit of B. W. Boeke, filed herein, and that this affiant very well remembers the day in the council meeting when the matters involved in this lawsuit were discussed; that Mr. Boeke was present there and that the mayor and council were present and that the senior Mr. Cuddy was there, representing this affiant; that a full and complete discussion was had with reference to the matters involved in this suit and it was on or about the 15th day of May, 1950.

The council and city officials wanted this affiant to cut off the front part of his basement, on which he was endeavoring to build a building and to set the building back ten feet, and the cost of doing this was discussed. It was agreed between the city council, while it was duly assembled, and this affiant, that he would cut the front part of his basement off and extend the building back further and that the city agreed to pay the cost of cutting this foundation off and this Plaintiff accepted the agreement and promised to, and did, cause his basement to be cut off and moved back, and was required to pay $2,542.00 to a contractor by the name of Victor Gottberg and was then required to pay for extra work and material, which made a total cost of $4,051.48. This

agreement was clear and unambiguous, that the city would pay these Plaintiffs, the cost of cutting this basement off, due to the fact that the city wanted to extend the width of 5th Avenue in front of this property.

The city has not paid this account and whether or not Mr. Boeke made a record of the matter, this Plaintiff cannot say, as it was the duty of Mr. Boeke to handle the records as he saw fit and was no part of this affiant's duty to see that any record was made by Mr. Boeke.

/s/ BURTON E. CARR.

Subscribed and Sworn to before me this 20th day of April, 1956.

[Seal] /s/ BAILEY E. BELL,
Notary Public in and for Alaska.

My commission expires: 1-28-57.

[Title of District Court and Cause.]

AFFIDAVIT

United States of America,
Territory of Alaska—ss.

Donald Rozell, being first duly sworn on oath, deposes and says that he was a member of the City Council in the month of May, 1950, and was present

as a councilman, in a meeting in which Burton E. Carr and his attorney, Warren Cuddy, appeared before the council and a discussion took place, whereby the city wanted to have Burton E. Carr set his building, that was then ready for construction, back further south of the line, so that 5th Avenue could be widened; that the foundation for the building was then constructed and was too close to the street to allow for the widening that the city was then in the process of doing.

After considerable discussion, it was agreed that if Burton E. Carr and his wife would cut the foundation off in front and set it back ten feet, that the city would pay the cost of moving his foundation back that far; that he understood that a bid was going to be procured and has since heard that it was procured and that it was the honest intention of the council at that time to pay Burton E. Carr the cost of moving his building back and that there was no discussion in the meeting there, apparently the Mayor and all of the council concurred.

/s/ DONALD ROZELL.

Subscribed & Sworn to before me this 20th day of April, 1956.

[Seal] /s/ BAILEY E. BELL,
Notary Public in and for Alaska.

My commission expires: 1-28-57.

Receipt of copy acknowledged.

[Endorsed]: Filed April 20, 1956.

[Title of District Court and Cause.]

## M. O. GRANTING MOTION FOR SUMMARY JUDGMENT

Now, at this time, this cause coming on to be heard before the Honorable J. L. McCarrey, Jr., District Judge, the following proceedings were had, to wit:

Now, at this time upon the Court's motion,

It Is Ordered that defendant's motion for summary judgment in cause No. A-11,887, entitled Burton E. Carr and Marie A. Carr, Plaintiff's, versus City of Anchorage, a Municipal Corporation, Defendant, be, and it is hereby, granted.

Entered June 8, 1956.

---

In the District Court for the Territory of Alaksa, Third Division

No. A-11,887

BURTON E. CARR and MARIE A. CARR,
Plaintiffs,

vs.

CITY OF ANCHORAGE, a Municipal Corporation,
Defendant.

## SUMMARY JUDGMENT

The motion of the defendant for summary judgment pursuant to Rule 56(c) of the Rules of Civil

Procedure, having been presented, and the court being fully advised,

The court finds that the defendant is entitled to a summary judgment as a matter of law.

It is therefore ordered, adjudged and decreed that the defendant's motion for summary judgment be, and the same hereby is granted, that the plaintiffs have and recover nothing by their suit, that the defendant, City of Anchorage, go hence without delay, and that defendant recover the sum of None Dollars, its costs and fees in this behalf expended and have execution therefor.

Enter:

Dated at Anchorage, Alaska, this 16th day of July, 1956.

/s/ J. L. McCARREY, JR.,
Judge.

[Endorsed]: Filed and entered July 16, 1956.

---

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Burton E. Carr and Marie A. Carr, Plaintiffs, hereby appeal to the United States Court of Appeals for the Ninth Cir-

cuit from the final judgment entered in this action on the 16th day of July, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN,
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed July 16, 1956.

---

[Title of District Court and Cause.]

## SPECIFICATIONS OF ERROR

I.

The Court erred in granting the Motion for Summary Judgment which was filed July 16, 1956, for the reason that the Complaint and Supporting Affidavit did state a cause of action in favor of the Plaintiff and against the Defendant, City of Anchorage, a municipal corporation.

Dated at Anchorage, Alaska, this 17th day of August, 1956.

BELL, SANDERS & TALLMAN,

By /s/ JAMES K. TALLMAN.

Receipt of copy acknowledged.

[Endorsed]: Filed August 17, 1956.

[Title of District Court and Cause.]

## CLERK'S CERTIFICATE
## ORIGINAL RECORD

I, Wm. A. Hilton, Clerk of the above-entitled Court, do hereby certify that pursuant to Rule 10(1) of the rules of the United States Court of Appeals, Ninth Circuit, and of Rules 75(g) and 75(o) of the Federal Rules of Civil Procedure, and of the designation of counsel for plaintiffs, I am transmitting herewith the Original Papers in my office dealing with the above-entitled action, including, though not designated, plaintiffs' specifications of error and designation of record.

The papers herewith transmitted constitute the record on appeal to the United States Court of Appeals, Ninth Circuit, from the judgment filed and entered in the above-entitled action by the above-entitled Court on July 16, 1956.

Dated at Anchorage, Alaska, this 20th day of August, 1956.

[Seal] /s/ WM. A. HILTON,

Clerk.

[Endorsed]: No. 15236. United States Court of Appeals for the Ninth Circuit. Burton E. Carr and Marie A. Carr, Appellants, vs. City of Anchorage, a Corporation, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Third Division.

Filed August 22, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15,236

IN THE

# United States Court of Appeals
## For the Ninth Circuit

---

BURTON E. CARR and MARIE A. CARR, *Appellants,*

vs.

CITY OF ANCHORAGE, a corporation, *Appellee.*

## BRIEF OF APPELLANTS.

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BELL, SANDERS & TALLMAN,
Box 1599, Anchorage, Alaska,
*Attorneys for Appellants.*

FILED
JAN 15 1957
PAUL P. O'BRIEN, CLERK

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No. 15,236

IN THE

# United States Court of Appeals
## For the Ninth Circuit

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| | |
|---|---|
| BURTON E. CARR and MARIE A. CARR, *Appellants,* vs. CITY OF ANCHORAGE, a corporation, *Appellee.* | |

BURTON E. CARR and
MARIE A. CARR,
*Appellants,*
vs.
CITY OF ANCHORAGE,
a corporation,
*Appellee.*

## BRIEF OF APPELLANTS.

---

### JURISDICTION.

The jurisdiction of the District Court was invoked and authorized under the Act of June 6, 1900, c. 786, Section 4, 31 Stat. 322, as amended 48 U. S. C. A., Section 101 and Section 53-1-1, 1949 Alaska Compiled Laws Annotated. The Circuit Court of Appeals has jurisdiction in this matter by virtue of the provisions of Section 1291, Chapter 92, of the Judiciary and Judicial Procedure Act, 28 U. S. C. A., June 25, 1948, c. 646, 62 Stat. 912, also, Section 8C of the Act of February 13, 1925, as amended. (28 U. S. C. A. 1294.) Practice in the district Court for the district of Alaska and appeals from the judgments rendered in

said Courts are all governed by the Federal Rules of Civil Procedure by virtue of 63 Stat. 445, 48 U. S. C. A. 103A.

---

## STATEMENT OF FACTS.

This action was commenced by filing a complaint in the District Court for the District of Alaska, Third Division. (See Tr. 3.) The complaint filed alleged that the City of Anchorage is a municipal corporation, organized and existing under and by virtue of the laws of the Territory of Alaska and of the United States of America.

It alleged that on or about the 15th day of May, 1950, these plaintiffs owned a piece of property located at the corner of Fifth Avenue and Denali Streets, with the legal description of:

> Lot One (1), Block Twenty (20), East Addition to the City of Anchorage, Alaska, according to the recorded plat thereof;

then alleged that, on the 15th day of May 1950, the defendant City of Anchorage, through its duly elected, qualified and acting council, while in a regular meeting thereof, unanimously promised these plaintiffs that if they would cut the foundation off on a building they were commencing to build and move the building back, they would pay the cost of cutting off the foundation and building it back further on the lot, so that the City could take ten feet of the front of said lot by condemnation for the purpose of widening the street and for sidewalk purposes.

Then plaintiffs alleged that they believed the council of said City of Anchorage, agreed with the said City of Anchorage that they would cut their foundation off in front and extend it at the back, and, relying thereon, did cut the foundation off in front, and did build back from the front twelve feet further.

Then plaintiffs alleged that the city became obligated and bound to pay for the cutting off of said foundation, and the extra work required to do so, to the extent of $4,051.48, the amount being based upon an estimate furnished by Victor Gottberg, a builder who cut off the foundation, and rebuilt it back, and was paid therefor $4,051.48, by the plaintiffs.

Then the complaint alleged that the defendant City of Anchorage failed, neglected and refused to pay said sum or any part thereof, and that the defendant is justly indebted to the plaintiffs in the sum of $4,051.48, together with interest thereon at the rate of six per cent (6%) per annum from the 1st day of August 1950, at the time the account became due and payable; and the prayer followed for that relief.

Then on March 5, 1956, a motion to dismiss was filed by the City of Anchorage, and on April 12, 1956, an answer was filed in which certain admissions were made and certain denials (Tr. 7), and four affirmative defenses were alleged:

1. The contract alleged in plaintiffs' complaint is beyond the scope of the powers of the defendant.

2. That the agreement was not entered into as provided by Section 105, Chapter II of the Anchorage General Code.

3. Is based upon the contention of the City Attorney that there was no minutes of the council meeting, as required by Section 16-1-63, ACLA, 1949.

4. That there is no record in the minutes of the meetings of the City Council of any vote by any vote by said council, as provided in Section 16-1-40, ACLA, 1949.

and prayed that the plaintiffs recover nothing.

To this answer was filed a motion to strike. (Tr. 10.) Wherein the plaintiffs moved to strike the 2nd, 3rd and 4th separate affirmative defenses, for the reason that they were surplusage, prejudicial, and the allegations therein state no defense to the plaintiffs' cause of action and supported the motion by a memorandum. (Tr. 10.) This motion was filed on April 18, 1956.

Then a motion for summary judgment was filed by the defendant (Tr. 11 and 12), relying upon Rule 56 b and c of the Federal Rules of Civil Procedure. In support of this motion, an affidavit of Ben W. Boeke was filed, in which he stated that he was the City Clerk of the City of Anchorage and had held the position for nine years; that the affidavit was submitted in support of defendant's motion for summary judgment and to show that there is in this action no genuine issue as to any material fact, and that the defendant is entitled to a judgment as a matter of law, and that he was more than twenty-one years of age and competent to be a witness in this case; that he was the keeper of the records of the city council meetings, and that, after a diligent search, he was

unable to find records in any of the minutes of the city council meetings whereby the city council has agreed to pay the plaintiffs as alleged in their complaint, and that there is no record where the mayor or the city manager ever signed an agreement to pay as alleged in plaintiffs' complaint, nor any record that the city clerk has attested any document which obligates the city to pay as set forth in plaintiffs' complaint in this cause, nor any record showing the approval of this agreement as to substance by the city manager, and approved as to form by the city attorney, and that he has been unable to find any record where the city council voted to obligate the city to pay money to the plaintiffs as stated in the plaintiffs' cause. This was filed April 19, 1956.

Then, on the 20th of April, objection to motion for summary judgment was filed by the plaintiffs herein. (See Tr. 14.) This objection was supported by two affidavits—one of Burton E. Carr, that he very well remembered the day in the council meeting, when the matter involved in this lawsuit was discussed; that Mr. Boeke was present and the mayor and council were present, and that the senior Mr. Cuddy (who is now deceased) was there representing this plaintiff, and that a full and complete understanding was arrived at, and this was on or about the 15th day of May, 1950; that the council and city officials wanted this plaintiff to cut off the front part of his basement and build his building back ten feet; that the cost of doing this was discussed while the city council was duly assembled; then the city, acting through the

council and mayor in this discussion, agreed that the plaintiff was to cut off his foundation and move it back, and the city would pay the costs of moving it back, and the figure of $2,542.00, the estimate of the contractor Victor Gottberg, was discussed. It is further stated in the affidavit that the actual cost of cutting it off and moving it back was $4,051.48. The agreement was clear and unambiguous that the city would pay these plaintiffs the costs of cutting this basement off, due to the fact that the city wanted to extend the width of Fifth Avenue in front of this property. He then stated that it was the duty of Mr. Boeke to handle the records and it was no part of the affiant's duty to see that any record was made of the meeting and agreements.

Then there was an additional affidavit of a man by the name of Donald Roselle, stating that he was a *member of the city council in the month of May, 1950, was present as a councilman at a meeting* in which Burton E. Carr and his attorney, Warren Cuddy, appeared before the council, and a discussion took place whereby the city wanted to have Burton E. Carr set his building that was then ready for construction back further South of the line, so that Fifth Avenue could be widened; that the foundation for the building was then constructed and was too close to the street to allow for the widening that the city was then in the process of doing; that after considerable discussion, it was agreed that if the plaintiffs Burton E. Carr and his wife would cut the foundation off in front and set it back ten feet, the city would pay the cost of his

moving the foundation back that far; that he understood that a bid was going to be procured, and has since heard that it was procured; that it was the honest intention of the council at that time to pay Burton E. Carr the cost of moving his building back; that apparently the mayor and all of the council concurred. This was filed on April 30, 1956.

Then, on June 8, 1956, the Court entered oral judgment granting the summary judgment (Tr. 18); then a summary judgment was prepared by the Defendant City of Anchorage, produced, signed and filed in the case on the 16th day of July, 1956. (Tr. 18 and 19.)

Thereafter, and on the 16th day of July, 1956, a notice of appeal was filed in the case. Then, on the 17th day of August, 1956, specifications of error were filed, and on the 20th day of August, 1956, the clerk's certificate was filed (Tr. 21); then the transcript was duly filed in the United States Court of Appeals, Ninth Circuit, on August 22, 1956. (Tr. 22.)

A careful checking of the docket in the trial Court discloses that there was no ruling ever made on the motion to strike from the answer (Tr. 10), or the motion to dismiss (Tr. 5); that an answer was filed on April 12, 1956, and the motion to strike was directed against the answer, but no ruling was ever made by the Court on either of those motions so far as the minutes and dockets disclose (the original file now being in the appellate Court.) The specifications of error are very short and directly to the point here involved:

"The Court erred in granting the motion for summary judgment, which was filed July 16, 1956, for the reason that the complaint and supporting affidavits did state a cause of action in favor of the Plaintiffs and against the Defendant City of Anchorage, a municipal corporation." (Tr. 20.)

Our brief in the matter will be directed specifically to the specifications of error set out above.

---

## ARGUMENT AND AUTHORITIES.

The city attorney relied upon a city ordinance for the right to have summary judgment granted. This city ordinance is Section 105.1 of Article II of the Anchorage General Code of Ordinances, and is, in words and figures, as follows:

"Section 105. Execution of Legal Documents.

105.1 All legal documents requiring the assent of the City shall be (1) approved by the City Council, (2) signed by the Mayor or City Manager on behalf of the City, (3) attested to thereon by the City Clerk, (4) approved thereon as to substance by the City Manager, and (5) approved thereon as to form by the City Attorney, unless otherwise provided by Territorial law, or a City ordinance."

This same Article II, on pages 17 and 18, is in part as follows:

"201.1. Powers. All legislative powers of the city and the determination of policy shall be vested in the Council. The Council shall have the powers conferred upon it by the laws of the Territory of Alaska, (as generally set out in Title 16, Chap. 1.,

Sec. 35, ACLA '49, as amended), the future State of Alaska, and as more particularly described in this Code."

"Without limitation of the foregoing the Council shall have power to:

"1. Take necessary action to protect and preserve the lives, the health, the safety and the well-being of the people of the city. (16-1-35 17th ACLA '49.)"

"2. Provide for fire protection, public health, police protection and the relief of the destitute and indigent. (16-1-35 6th ACLA '49.)"

"3. Provide rules and by-laws for council proceedings. (16-1-35 1st ACLA '49.)"

"5. Provide *streets,* alleys, *sidewalks,* sewers, wharves, etc. (16-1-35 3rd ACLA '49.)"

"20. Acquire and sell property with election and ratification sometimes required. (16-1-35 20th ACLA '49.)"

"26. Incur indebtedness for public works under limitations. (16-5-1 et seq. ACLA '49 and various Congressional Acts.)"

"31. Levy special assessments for public works sidewalks, snow removal after petition by property owners. (16-1-31 et seq. ACLA '49.)"

"41. To regulate the use of city streets by motor vehicles. (50-4-5 ACLA '49.)" (Emphasis ours.)

Then the general statutes of the Territory of Alaska authorize municipal corporations to do certain things and grants certain powers to them, in addition to the inherent powers to do all things necessary in carrying out the purposes for which it was formed, and we es-

pecially call your attention to 56-2-1 and 56-2-2, Alaska Compiled Laws, Annotated 1949, which read as follows:

> "§56-2-1. Actions by public corporations: Causes. An action may be maintained by any incorporated town, school district, or other public corporation of like character in the Territory in its corporate name, and upon a cause of action accruing to it in its corporated character, and not otherwise, in either of the following cases:
>
> First. Upon a contract made with such public corporation;
>
> Second. Upon a liability prescribed by law in favor of such public corporations;
>
> Third. To recover a penalty or forfeiture given to such public corporation;
>
> Fourth. To recover damages for an injury to the corporate rights or property of such public corporation. (CLA 1913, §1165; CLA 1933, §3816.)
>
> §56-2-2. Actions against public corporations. An action may be maintained against any of the public corporations in the Territory mentioned in the last preceding section in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such public corporation. (CLA 1913, §1166; CLA 1933, §3817.)"

The District Court of Alaska, in an opinion in *Nome v. Lange,* 1 Alaska 593, Judge Wickersham passed on a part of this above quoted section of the Alaskan statutes; while it is not directly in point, we thought it fair to call the Court's attention to it.

Section 56-4-1 ACLA did away with the writ of *Scire Facias* and the writ of *Quo Warranto,* but provided an adequate remedy for recovery.

Then Section 16-1-35 granted to the council certain powers, a few of which are as follows:

> To adopt rules and by-laws for their own proceedings; to provide for the location, construction and maintenance of the necessary *streets,* alleys, crossings, *sidewalks,* sewers, wharves, aquaducts, dikes and watercourses, and to widen, straighten or change the channel for streams and watercourses; to purchase, construct, or otherwise acquire, establish and operate public wharves, public cold-storage plants, telephone systems and plants for the use, sale and distribution of light, water, power, heat and telephone service; (and on Page 192) to acquire lands and sites; (on Page 193) to provide for fire protection, public health, police protection and the relief of the destitute and indigent; (on Page 195) to take such other action by ordinance, resolution *OR OTHERWISE,* as may be necessary to protect and preserve the lives, health, safety and *well-being* of the people of the city; (on Page 196) to acquire by purchase or otherwise, and to hold, real estate and other property and any interest therein; provided for a city planning commission; building regulations; zoning ordinances; provided "the Council shall constitute a board of adjustment hereunder, with the Mayor as ex-officio chairman, and may, in appropriate cases, and subject to the appropriate conditions and safeguards, make special exceptions to the terms of the ordinances and regulations adopted"; (Emphasis ours.)

and many other powers are granted by this section.

Then this honorable Court, in construing those powers, along with the general inherent powers, held, in the case of *Femmer v. City of Juneau,* et al., (97 Fed. 2nd 652) as follows:

> ' "Ordinarily the local corporation is permitted to enter into all contracts which are proper and necessary to enable it to perform the functions expressly conferred and *those which are necessarily implied from the powers conferred* * * *. The power to make contracts may result (a) from the inherent power of a municipality to perform indispensable acts, (b) from express words in a statute or the charter, or (c) *from what is implied as an incident to the powers expressly conferred on the municipality by a statute or the charter.*
>
> "* * * in order to exercise these (express) powers the municipality of course must make appropriate contracts; and it may be stated as a general rule that where there is no *charter* or *statutory restriction* a municipality may make any contract necessary to enable it to carry out the particular powers expressly conferred. 'A corporation authorized to do an act has, in respect to it, the power to make all contracts that natural persons could make.' * * *" ' (Emphasis ours.)

The honorable trial Court, in our opinion, erred in that he held that the only way the city could become liable in a contract was provided for under Section 105.1 above set forth. We argue then, and continue to argue, that a careful examination of this section shows, that it does not require that anything be done in any particular form, except that *legal documents*

*requiring the assent of the city are required to be executed as this particular paragraph required.* This paragraph does not state, and does not infer, that all contracts must be performed this way, nor that any particular action of the city council must be ratified or approved in accordance with this particular paragraph.

It would require extreme distortion to find the paragraph in question was meant to apply to all acts of the city council, and it is impossible and unreasonable, in our opinion, to give such effect to the particular wording of this section. For an example the defendant City of Anchorage filed a motion to dismiss in this case; it also filed a motion for summary judgment; it filed an answer; none of these instruments were executed by anyone except by Lynn W. Kirkland, the city attorney, and it is, to us, impossible to conceive that all legal activities of the city, and all regular contracts and agreements, have to be done as contended for by the defendant City of Anchorage in this case. The documents, as pleaded and last above referred to, do not show that they were approved by the city council, were signed by the mayor or city manager, attested to by the city clerk, nor approved in substance by the city manager. This also applies to the hundreds of contracts of purchase, and especially the contracts of employment entered into by the city in good faith and carried out. There is no reason why this agreement between the plaintiffs, who are the appellants here, and the defendant, who is the appellee here, acted upon, and entered into, in the

very best of faith, should not be carried out the same as any other agreement made by the City of Anchorage with any other individual. There is no question but what the city council and the mayor had the authority to make the agreement; the execution of the agreement is not denied; the affidavit of Ben Boeke, city clerk, amounts to a negative pregnant, in which he denies certain little things, but does not deny that the agreement was actually made, and the complaint of the plaintiffs, and the affidavits filed, to meet the requirement of the Federal Rules of Civil Procedure, show specifically that it was made, and even a Councilman made an affidavit that it was actually made and in good faith, with the intention of carrying it out. (Tr. 16.) This affidavit states that the city wanted Burton E. Carr to set his building, that was then ready for construction, back further South of the street line, so that Fifth Avenue could be widened, and states further that the foundation for the building was then constructed, and was too close to allow for the widening that the city was then in the process of doing. He then states it was agreed that if Burton E. Carr and his wife would cut the foundation off in front, and set it back ten feet, that the city would pay the costs of moving his foundation back that far; that the mayor and council all concurred. This statement is supported by the affidavit of Burton E. Carr, one of the plaintiffs in the matter, (Tr. 15) and he stated that he did cut off his foundation, did set it back, and paid therefor the sum of four thousand fifty-one dollars and forty-eight cents ($4,051.48), and no one attempts to even doubt or dispute these facts, but the

trial judge granted a summary judgment, directly against all of the facts, based solely upon this ordinance, which, to us, clearly is an ordinance regulating legal documents of conveyance, and does not apply to common contracts of the city.

McQuillin, Municipal Corporations, Second Edition, Revised, Volume VI, Paragraph 2652, Liability On Contracts, reads as follows:

> "#2652 (2488). Liability on contracts. A municipal corporation is bound by, and may sue and be sued on, all contracts which it may legally enter into in like manner as a private corporation or an individual. The immunity of government from liability on contracts has never been regarded as applicable to these local governmental organs. Even when acting as representatives of the sovereign state they are held liable. Accordingly they are liable to actions of implied assumpsit. Thus, where a municipality appropriates and uses the property of another, an obligation to pay for its use is implied which may be enforced by action.
>
> "And municipal corporations, having received money or property under contracts so far beyond their powers as not to be capable of being enforced or sued on, according to their terms, have been held, while not liable to pay according to the contracts, to be bound to account for the money or property which they have received. Thus, where a city was sued for damages for putting an end to a contract with the plaintiffs, for the improvement of its sidewalks, the only invalid part of which was its promise to pay in bonds, which it was beyond its power to issue, it was decided that the invalidity of that promise

was no reason why the city should not pay for the benefits which it had received from the plaintiff's performance of the contract. 'It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds, because their issue is ultra vires it would be sanctioning rank injustice to hold that payment need not be made at all.'

"The proposition that a city cannot incur liabilities otherwise than by ordinance 'in its full extent *is not tenable.* Under some circumstances a municipal corporation may *become liable by implication.* The obligation to do justice rests *equally upon it as upon an individual.* It cannot avail itself of the property or labor of a party and screen itself from responsibility under the plea that it never passed an ordinance on the subject. *As against individuals, the law implies a a promise to pay in such cases, and the implication extends equally against corporations. This is as well established by the authorities as any principle of law can be . . . A corporate act* is not essential in all cases to fasten a liability, and if it were necessary the law would sometimes presume, in order to uphold fair dealings and prevent gross injustice, the existence of such acts, and estop the corporation from denying it. Where the contract is executory, the corporation cannot be held bound unless the contract is made in pursuance of the provisions of its charter, *but where the contract has been executed, and the corporation has enjoyed the benefit of the consideration, an implied assumpsit arises against it.'*

This subject and the doctrine of municipal liability on ultra vires and unauthorized contracts are

fully considered in an earlier chapter." (Emphasis ours.)

A case that is directly in point with the case at bar is *Hitchcock v. Galveston*, 96 U. S. Reports, commencing on page 340. That action was based upon a contract between the City of Galveston and Hitchcock to do certain sidewalk improvements, and the contractor was to be paid in bonds, and it was later determined that the City of Galveston was not empowered to issue the bonds, and therefore refused to comply with the contract on the theory that the contract was ultra vires, and could not be enforced. The Honorable Justice Strong, in delivering the opinion for the United States Supreme Court, quoting from page 350, states:

> ". . . It is enough for them that the city council have power to enter into a contract for the improvement of the sidewalks; that such a contract was made with them; that under it they have proceeded to furnish materials and do work, as well as to assume liabilities; that the city has received and now enjoys the benefit of what they have done and furnished; that for these things the city promised to pay; and that after having received the benefit of the contract the city has broken it. It matters not that the promise was to pay in a manner not authorized by law. If payments cannot be made in bonds because their issue is ultra vires, it would be sanctioning rank injustice to hold that payment need not be made at all. Such is not the law. The contract between the parties is in force, so far as it is lawful."

This case is directly in point with the case at bar; even if the city exceeded its authority, acting by and through its mayor and council in meeting duly assembled, made this agreement in good faith, which must be conceded, as the good faith thereof is not denied, then the city received the benefit of the agreement, and cannot be heard to deny the duty to pay the costs of cutting this foundation off and moving it back, because such an interpretation would be encouraging the city in a fraudulent contention. To allow a city to pass an ordinance like the one pleaded above, 105.1, and then hide behind it to defeat justice, would deny all equitable and legal principles that we have so well recognized over the years, and the interpretation placed upon it by the trial Court, if allowed to stand, would give the city that advantage.

Another case so directly in point is *Arkansas Valley Compress and Warehouse Company v. Morgan, et al.*, 229 S.W. (2d) 133, and, due to the fact that this decision is very long, we are contenting ourselves to quote from some of the syllabuses as follows:

> "8. Municipal corporations 226
>
> A city entering into contracts involving, not government of its citizens, but only convenience, pleasure and profit of city and its people, acts in 'proprietary capacity'."
>
> "10. Municipal corporations 226
> A city making contracts in its proprietary capacity is bound thereby as any private corporation or citizen would be."

> "11. Municipal corporations 1
>
> Powers granted municipality for private advantages must be regarded as exercised by municipality as private corporation, though public may also derive benefit therefrom."
>
> "12. Municipal corporations 1
>
> Municipal corporations, in their private character as owners and occupiers of property, are regarded as individuals."
>
> "13. Municipal corporations 1, 221
>
> A municipal corporation, in its purely business, as distinguished from governmental, relations, is governed by same rules and held to same standards of just dealing prescribed by law for private individuals or corporations and is clothed with same full measure of authority over its property."

This case clearly illustrates the fallacy of allowing a municipal corporation, acting in its business capacity, to defeat justice by technical defenses.

Another case along a somewhat similar point is *Vito v. Town of Simsbury,* 87 Atlantic 722, wherein the headnote reads as follows:

> "In the absence of statutory objection, a town may become liable on an implied contract for the reasonable worth of a permanent improvement constructed under an imperfectly executed contract, and retained by the town as part of the highway."

Since the defendant herein has accepted the benefits of the agreement between plaintiff and the city here, the doctrine of estoppel should now apply. For

the correct rule on this point, see McQuillin on Municipal Corporations, Volume 10 at page 416, Section 29.103:

> "It has been said that the 'doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it', so that, although some courts limit the application of the doctrine to exceptional cases, it is generally held that a municipal corporation may be concluded by an estoppel in Pais like a natural person. The rule is limited to contracts within their powers, and 'as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principles and under the same circumstances as natural persons.' Stated in another way, when a city enters into a contract, or becomes obligated to another by operation of law, within its municipal powers, the doctrine of estoppel obtains against it with the same force and effect as against an individual, and hence it cannot deny the binding force and effect of such contract or obligation. Conversely, a litigant who has enjoyed and retained benefits of a contract with a municipal corporation may, in a proper case, be estopped to question the validity of the contract."

For cases in support of this doctrine, see *Getz v. City of Harvey*, 118 Fed. (2d) 817, wherein it is stated at page 827:

> "Commenting more sharply upon the attempt of the city to plead invalidity in the face of its enjoyment of the benefits of its acts, the court add that: 'No charge of fraud, combination or oppression is made. Every act seems to have been

fairly done and in pursuance of law. The disreputable feature of the case is, that the same authority doing all these acts, and whose city has received the benefits of them, now seeks to repudiate them. There is no rule of law, equity, justice or morals compelling this, and we cannot sanction it.' "

Also see *Quarles v. City of Appleton*, 299 Fed. 508, at page 516, where it is stated:

> "The doctrine of estoppel is predicated upon common honesty, and municipalities as well as individuals are affected by it. No better statement of this rule can be found than that appearing in Eau Claire Dell's Improvement Company v. Eau Claire, 172 Wis. 240, 179 N.W. 2, where the court said 'it is now well settled that, as to matters within the scope of their powers and the powers of their officers, such corporations may be estopped upon the same principals and under the same circumstances as natural persons.' "

For further cases on this question of estoppel, see: *City of Jefferson v. Holder*, 24 S.E. (2d) 187; *City of East Point v. Upchurch Packing Company*, 200 S.E. 210; *City of Chetopa v. Board of County Commissioners of Labette County*, 143 Pac. (2d) 194; *Bonsack and Pearce v. School District*, 49 S.W. (2d) 1085; *Lucier v. Manchester*, 117 Atlantic 286; *Amazeen v. New Castle*, 81 Atlantic 1079; *Independent Paving Company v. Bay St. Louis*, 74 Fed. (2d) 961, 964; *Adams v. Ziegler*, 70 Pac. 537; *Branigar v. Riverdale*, 72 N.E. (2d) 201; *Hinkle v. City of West Monroe*, 200 So. 468; *Mentz v. Mamou*, 116 So. 561; *Gentram v.*

*Mayor & City Council of Baltimore*, 35 Atlantic (2d) 128; *Schueler v. Kirkwood*, 177 S.W. 760; *Morearity v. McCook*, 219 N.W. 829; *City of San Antonio v. Guadalupe-Blanco River Authority*, 191 S.W. (2d) 118, 125; *Wilson v. King's Lake Drainage & Levee Dist.*, 165 S.W. 734; *Baxter v. Village of Manchester*, 28 N.E. (2d) 672.

Also in connection with this particular point, see McQuillin on Municipal Corporations, Volume 10, footnote at page 416, as follows:

> "Respecting ultra vires doctrine, generally corporations, no less than actual persons, are held to contracts which are free from charges of fraud, collusion, or evident error. Whitesburg v. Whitesburg Water Co., 257 Ky. 444, 78 S.W. (2d) 330, 333, 334.
>
> Where the municipality advertised for bids for sewer pipe and awarded a contract thereon, it could not, after laying the pipe, defend against an action for the price *on the ground that the contract was not drawn as required by statute*. Carey v. East Saginaw, 79 Mich. 73, 44 N.W. 168." (Emphasis ours.)

Estoppel should apply against the defendant here for the reason that the plaintiffs have changed their position, at the request and relying upon the promises of the defendant. The defendant should not be estopped from asserting its action in entering this contract is invalid, whether or not it was. It is the plaintiffs' position that the action was not invalid in the first place, since there is no particular form prescribed for the entering of contracts of this nature. As

pointed out earlier, a contract is not necessarily a legal document and hence, under the terms of Section 105 of Chapter II of the Anchorage General Code, and unless some particular method is set forth for the entering of such contracts, the contract here would be as valid as any contract. Even the statute of frauds would not be a problem.

It should also be pointed out that enabling legislation which gives the power to the council of the municipal corporation is contained in Section 16-1-35 ACLA (1949) and the amending session laws. Nowhere in the enabling legislation is there a requirement that all contracts must be executed by certain formalities. This section contains the powers that are granted by the Territory of Alaska to the cities *and the ordinances of the particular cities are merely directives to the local governing body and should never be used for the purpose of avoiding legitimate contracts of the city.*

A very important Oregon case is *Winklebleck v. City of Portland*, 31 Pac. (2d) 637. For the purpose of brevity, we will quote the 3rd syllabus, and say, without fear of successful contradiction, that this is the holding in the body of the opinion. Syllabus 3 reads as follows:

> "3. Municipal corporations 244 (2)
>
> Contract binding municipal corporation may be brought into existence by vote of municipal council."

It is not the fault of the plaintiffs if the defendants fail to keep a record in their meetings as required by

law, and there is an assumption that the city did keep minutes of this meeting. It would be presumed that they did their duty, and complied with their own ordinances and the laws of the Territory of Alaska, and whether they did or not cannot be used by the City of Anchorage to discharge a legal responsibility entered into in good faith by all persons.

We therefore petition this Honorable Court to reverse the judgment of the trial Court in granting a summary judgment in this case.

Dated, Anchorage, Alaska,
January 2, 1957.

Respectfully submitted,

BELL, SANDERS & TALLMAN,
By BAILEY E. BELL,
*Attorneys for Appellants.*

No. 15,236

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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| | |
|---|---|
| BURTON E. CARR and MARIE A. CARR, *Appellants,* | } |
| vs. | |
| CITY OF ANCHORAGE, a corporation, *Appellee.* | |

## BRIEF OF APPELLEE.

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FILED
FEB 19 1957
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| BURTON E. CARR and MARIE A. CARR, *Appellants,* | |
| vs. | |
| CITY OF ANCHORAGE, a corporation, *Appellee.* | |

## BRIEF OF APPELLEE.

---

### STATEMENT OF THE CASE.

The plaintiff filed an action in the District Court for the District of Alaska, Third Division. This complaint filed alleged in substance a contract between Burton E. Carr and the City of Anchorage, wherein the City agreed to pay the plaintiff the cost of moving a building back in order that the City might condemn certain properties for purposes of widening the street and sidewalk. Appellee is unable to ascertain from the pleadings whether or not the plaintiff below sued on an express contract. Plaintiff alleged that the City agreed and was therefore bound to pay for the

cutting of the foundation and removal of the building. The defendant answered this complaint denying that it ever made any agreement with the plaintiff as he alleged and therefore nothing was due and owing the plaintiff. A motion to dismiss was filed and then on April 12, 1956, an answer was filed. On the basis of the answer and the affidavit of Ben Boeke (TR page 12) plaintiff moved for Summary Judgment. Defendant below filed affidavit in opposition to motion for Summary Judgment. A hearing was had on the 8th day of June, 1956 and the Court entered a minute order granting Summary Judgment (TR page 18) and subsequently the City submitted a formal Summary Judgment in accordance with the minute order and the same was filed on July 6, 1956 (TR page 18). Thereafter the plaintiff appealed to this Court by giving Notice of Appeal on the 16th day of July, 1956.

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## ARGUMENTS AND AUTHORITIES.

### ARGUMENT I.

**THERE WAS NO ERROR ON THE PART OF THE DISTRICT COURT IN GRANTING APPELLANT'S MOTION FOR SUMMARY JUDGMENT.**

On the basis of the affidavits, pleadings, ordinances of the City of Anchorage, statutes of the Territory of Alaska, and oral argument by counsel, the Trial Court correctly granted Summary Judgment in favor of the defendant below.

## ARGUMENT II.

## PLAINTIFF BELOW HAD NO VALID ENFORCEABLE CONTRACT WITH THE CITY OF ANCHORAGE.

It is the Appellee's contention that none of the necessary formalities were complied with. The City relied partly on the provision of Section 105.1 of Article II of the Anchorage General Code (Appellant's brief page 8) requiring all legal documents requiring the assent of the City to be signed by the Mayor, etc. Appellant's complaint does not allege compliance with said ordinance. The ordinance was cited as an affirmative defense (TR page 8). The language of this section is not conclusive, however, a contract is a legal document requiring the assent of the City. A contract of the nature the plaintiff claims would fall within the intent of the section.

Section 111 of the same article in the General Code, provides:

> "Section 111. Competitive Bidding. Section 111.1 No purchase of or contract for supplies, materials, services of a non-professional nature, or equipment in excess of $500.00 shall be made by any city official or employee before giving ample opportunity for competitive bidding, under such rules and regulations, and with such exceptions, as the City Manager, with Council approval, shall prescribe; such rules shall as closely as practicable follow the Territorial law on this subject (applicable only to the Territory at time of passage of this Code) contained in Chap. 4, Title 14, ACLA 1949, as amended."

The provisions of the last quoted section prohibit the making of contracts binding the City wherein the

consideration is more than $500 made with any City official or employee.

The alleged agreement with the City of Anchorage according to Appellant's complaint (TR page 4) and Appellant's affidavit (TR page 15) involved the widening of 5th Avenue in the City of Anchorage and the necessity of moving Appellant's building. As to City improvements Section 112.1 provides:

> "Section 112. Contracts for City Improvements and Public Works. 112.1. Any city improvement costing more than $1000.00 shall be executed by contract except where such improvement is authorized by the Council to be executed directly by a city department in conformity with detailed plans, specifications and estimates. All such contracts for more than $1000.00 shall be awarded to the lowest responsible bidder after public notice and competition, under such rules and regulations as the City Manager, with Council approval, shall prescribe. Rules and regulations shall as closely as practicable follow the Territorial law on this subject (applicable only to the Territory at time of passage of this Code) contained in Chapter 1, Title 14, ACLA 1949, as amended. The Council is empowered to reject all bids and advertise again or negotiate with any bidder. Alterations in any contract for more than $1000.00 may be made when authorized by the Council upon the written recommendation of the City Manager. The City may undertake city improvements and public works with its own forces."

There is no allegation in the complaint nor in the supporting affidavit of Appellant of any compliance

with this ordinance. McQuillin, Municipal Corporations, Third Edition, Revised, Volume 10, page 241, Paragraph 29.21 states in part,

> ". . . Generally, the statutes or the charter or both, more or less specifically provide how municipal contracts shall be made and executed and it is settled that the municipality can make a contract only in the manner prescribed and if not so made the contract is invalid and unenforceable."

This is supported by *Wacker-Wabash Corp. v. City of Chicago,* 350 Ill. App. 343, 112 NE 2d 903. *Adolian Bros. v. Boston,* 323 Mass. 629, 84 NE 2d 35.

Assuming for the purpose of argument that none of the above quoted ordinances is applicable to the instant case, there still remains the Territorial Statute pleaded by defendant below as an affirmative defense (TR page 9). Appellant alleged essentially an agreement with the council whereby the Appellee agreed to pay an amount of money for the cost of Appellant's cutting and moving a certain portion of his building. The statute reads:

> "All votes in the council on ordinances, resolutions and authorizations for the payment of money shall be ayes and nays and the vote of each member shall be permanently recorded in the proceedings of the council."
>
> ACLA 16-1-40 1949.

The affidavit of the City Clerk (TR page 12) indicates no record of any agreement made with Appellant, nor was there any record of any vote taken obligating the City to pay money. The statute is clear

in its requirement that all authorizations to pay money be by ayes and nays and said vote be permanently recorded. If the record does not show the taking of yea and nay, the court will not presume they were taken *(People v. Chicago and NW Railway Co.* 396 Ill. 446, 21 NE 2d 701). If such a vote were not taken the city could not become obligated. (See also McQuillin, Section 13.44, Vol. 4).

The statute quoted taken together with the ordinances of the City of Anchorage indicate certain prerequisites to the formation of a contract with the City. The reasons for these rules are obviously designed to safeguard municipalities against possible fraudulent claims and oppressive claims which are unsupported by records. City administrations are not permanent nor are their legislative bodies. To insure successful continuity records are required of what the previous council may have done. According to plaintiff below the agreement was entered into in May, 1950 (TR page 4). The complaint was filed in February of 1956. It should also be noted that there is no allegation of any previous demand for payment being made against the City in Appellant's brief. Such a delay as is indicated here makes it unduly burdensome on the municipality where later required to defend an action where it has no concrete proof of agreements, their intent and the council action thereon.

## PART II.

### THE AUTHORITY PUT FORWARD BY APPELLANT FAILS TO SUPPORT HIS CONTENTIONS THAT THE CITY OF ANCHORAGE IS LIABLE ON A CONTRACT TO APPELLEE.

Appellant's brief fails to comply with the rules of this Court. Appellant's brief fails to number and set out particularly each error intended to be urged (Appellant's brief page 8) as is required by the Rules of this Court (Rule 18, Section 2, Subsection (d) of the Rules of the U. S. Court of Appeals for the Ninth Circuit).

The substance of Appellant's specification of error though improperly set out is that the District Court erred in granting the motion for Summary Judgment for the reason that the plaintiff's complaint did state a cause of action against the defendant (Appellant's brief page 8). Such a specification of error is meaningless. In this case Summary Judgment was granted for the defendant below (TR page 18). The basis of the Judgment was that the pleadings and affidavits on file showed there was no genuine issue as to any material fact and the defendant Appellee was entitled to a Judgment as a matter of law (Rule 56 of the Federal Rules of Civil Procedure). Thus a complaint could state a valid claim and the defendant could still be entitled on the basis of pleadings and affidavits to Judgment as a matter of law.

The remaining portion of this part of Appellee's brief will follow as closely as possible the order of Appellant's brief.

The Appellant cites ordinances of the City of Anchorage and the laws of the Territory of Alaska,

wherein the powers of cities are enumerated (Appellant's brief page 8). The Appellee has no quarrel with these ordinances and admits the City of Anchorage acting through its council has the powers enumerated by the ordinances and statutes of the Territory of Alaska. There is no argument with the proposition that the City has the power to contract with the defendant, however, certain regular procedures must be followed.

The District Court in granting the motion for Summary Judgment (TR page 12) has decided the Appellee was entitled to Judgment as a matter of law based on the authority presented to it that there was no enforceable contract with the Appellant, taking into consideration the pleadings, affidavits and oral arguments.

Appellant cites *Femmer v. City of Juneau, et al.*, 97 Fed. 2d 652 (Appellant's brief page 12) which discusses the powers of Cities to contract where not given specific authority but are necessarily implied from the powers conferred. This argument again seems meaningless as nowhere does an argument of this nature appear. The record fails to indicate that an argument was urged that the City, Appellee, had no power to enter into this type of contract. At least nothing of this nature appears in the pleadings. The Appellee will concur in Appellant's proposition that the City had the power to enter into this type of agreement urged here, but contends that no valid contract was ever consummated.

Appellant next argues (Appellant's brief page 12) that the District Court erred in holding that the City could be held liable on a contract drawn only in accordance with Section 105 of the City ordinance. This is not a holding by the District Court and no findings of fact or conclusions of law are entered. As this ordinance was cited in Appellee's answer (TR page 8) it necessarily entered into the trial court's decision, as would the remaining affirmative defenses (TR page 9).

Appellant's brief page 14 urges that the affidavit of the City Clerk does not deny the agreement was made and urges that this was a negative pregnant. We are unable to agree with this (TR page 12). The affidavit was made for the express purpose of showing that there was no agreement nor apparently no discussion of an agreement ever recorded in the minutes of the council meeting and to show that the requisite formalities in contracting for the City were not carried out. The Appellant then discusses an affidavit made by Councilman Rozell, plaintiff's brief page 14 (TR page 16), that an agreement was made in good faith with the intention of carrying it out. It should be noted here that the affidavit of Rozell states that he was present in a meeting where Burton E. Carr appeared. It does not indicate that this was a regular meeting of the council at which a quorum was present nor does it indicate the presence of the City Clerk who was the City Clerk at the time of this alleged agreement. There is the possibility that this all took place as stated in the affidavit, yet there is no presump-

tion nor any statement to the effect that this was a regular council meeting with a quorum present to transact business in a regular manner, nor that any such agreement was ever made after a vote by the council.

Appellant discusses further the affidavits of Rozell and Carr and states that it was agreed that if Carr would cut the foundation off in front and set it back 10 feet, the City would pay the cost of moving his foundation back that far (Appellant's brief page 14). Based on the affidavit, Appellant urges that no one attempts or doubts to dispute this fact (Appellant's brief page 14). Appellee denied this allegation in its Answer (TR page 7). Defendant below then filed a motion for Summary Judgment (TR page 12) and supported it with the affidavit of B. W. Boeke, City Clerk (TR page 12). The affidavits filed by the plaintiff below were supposedly directed at the defendant's motion for Summary Judgment and the supporting affidavits; these statements of Appellant (Pages 14 and 15) are merely a restatement of Appellant's affirmative case and would not necessarily enter into the granting of Summary Judgment by this District Court (TR page 18).

Appellant next cites McQuillin Municipal Corporations, Second Edition, Revised, Volume VI, Paragraph 2652 (Appellant's brief page 15). Most of the law quoted here is general law and plaintiff will agree with the propositions stated therein. Apparently part of the statements made deal with contracts made ultra vires in some way; this doctrine is not involved in the case at issue here. It should be noted that Section

29.26, McQuillin Municipal Corporations, Volume 10, Third Edition, page 257, second paragraph, says:

> "The general rule is that if a contract is within the corporate power of a municipality but the contract is entered into without *observing mandatory legal requirements specifically regulating the mode by which it is to be exercised, there can be no recovery thereunder.*" Citing *United States. Lane-Western Co. v. Buchanan County,* 85 F. (2d) 343, 350, citing McQuillin text; *Edison Electric Co. v. Pasadena,* 178 Fed. 425.

As pointed out in the paragraph before, this rule prevails despite the propositions, ratification, estoppel or implied contracts. Appellant's brief then cites *Hitchcock v. Galveston,* 96 U. S. Reports, page 340, and urges that this case is directly in point (Appellant's brief page 17). This case is not even remotely at point with the case at bar. The facts of that case indicate a regular orderly procedure of contract wherein ordinances were passed and the Mayor was authorized and directed to enter into the contract. The contract was drawn up, ratified and approved by the City Council. The City Council there had authority to construct the sidewalks. The manner of payment was apparently not authorized by law. We certainly do not urge here that the City would not have the authority to act, but only urge that there was no contract because there was not even the bare minimum of formality as required by the ordinances and statutes of the Territory of Alaska.

Quoting headnotes from *Arkansas Valley Compress and Warehouse Company v. Morgan et al.,* 229 SW

(2d) 133, Appellant cites this as "another case directly in point" (Appellant's brief page 18). The question involved was the validity of a lease made by the City of Little Rock. The City was a defendant but prayed the relief be granted in the complaint. The City in executing the lease complied with all the legal requirements and the parties were governed by it for a period of years. The Appellate Court held there was no fraud of any species and after discussing the fact that the lease involved the City in its proprietary function found it could not cancel its lease because of inadequacy of consideration. We fail to see any connection between the law and facts of this case and the case at bar, and concur in the results of the case plaintiff below has cited.

Appellee would urge *Vito v. Town of Simsbury,* 87 Conn. 261, 87 Atlantic 722, in support of its position and it has been cited by Appellant (Appellant's brief page 19). In the case cited the defendant town voted to expend certain funds for road improvement. Pursuant to said vote selectman applied to the highway commission. Plaintiff was the successful bidder and was awarded a written contract as provided in the act and it was duly executed. The only irregularity appeared in the manner of opening of bids. The plaintiff even received certain money from the town. Plaintiff had done the work and a dispute arose as to how much was due him and whether or not defendant town was to pay for a retaining wall. Quoting from the opinion:

> "It is well settled that municipal corporations cannot be made liable on implied contracts which

> would be ultra vires if attempted to be made in express terms or which they are forbidden by statute to enter into except in a particular manner. We do not think however, that any statutory requirement has been omitted in this case, which is in the nature of a condition precedent to the creation of a contractual obligation on the part of the town."
>
> *Vito v. Town of Simsbury,* 87 Atlantic 722.

The court only said that the town could be held liable on an imperfectly executed contract (plaintiff's brief page 19). The case at bar, Appellee urges, in no way parallels case cited by Appellant, and the general law stated in the case is favorable to the Appellee's position.

Appellant quotes from McQuillin Vol. 10, page 416 Section 29.103 (Appellant's brief page 20) but fails to quote either the first part of the section or the last sentence which is:

> "If an invalid contract is one the corporation could not make, is not void because not in compliance with a mandatory provision of the law, it may be ratified."

Appellee's position is that mandatory provisions were not complied with (Appellee's brief part I).

Although there is doubt as to whether or not the doctrine of estoppel applies in the instant case even considering the section of McQuillin cited by the plaintiff below (Appellant's brief page 20), the case cited by Appellant, *Getz v. City of Harvey,* 118 Fed. 2d 817, differs materially in its facts from the case at

bar and certainly makes no holding concerning estoppel as applied to municipal corporations which would parallel this case.

It would seem that the doctrine of estoppel was correctly applied in *Quarles v. City of Appleton,* 299 Fed. 508, page 514, (cited by Appellant page 21) in view of the language,

> "We have then, no case of executory contract, no situation where plaintiff is seeking compensation for services rendered pursuant to a contract prohibited by statute or in violation of any statute. Rather, do we find a situation where a utility rightfully present in a municipality seeks to recover for services rendered with the knowledge and consent of the defendant, and without which defendant could not exist, and which services were obtainable from no other source."

As Appellee has previously stated the doctrine of estoppel does not apply in the instant case and the facts are substantially different from the case cited by the plaintiff below. The remaining cases are apparently cited to indicate the general law of estoppel (Appellant's brief page 22) which Appellant will agree with, but as the specific cases cited do not parallel the facts present in the case, further discussion of cases in estoppel would not seem worthwhile.

There is no claim by the defendant below that such a contract as indicated by the plaintiff below would be ultra vires as apparently urged by Appellant's further citation of McQuillin on Municipal Corporations, Volume 10, page 416 (Appellant's brief page

22). The second paragraph of quotation (Appellant's brief page 21) suggests a regularity of proceeding which has not been known to be present here.

Appellant then urges that nowhere does the enabling legislation require all contracts to be executed with certain formalities (Appellant's brief page 23). Plaintiff below suggests that this statute (ACLA 16-1-35 1949) gives Alaskan cities their powers. Good drafting would suggest that the formalities required for action by cities would not be within section enumerating powers given to cities. The formality required is covered by Section 16-1-40 which we have dealt with in another section of our brief (Appellee's brief page 4).

Appellee agrees with the statement of law urged by plaintiff below in the last case cited in his brief (Appellant's brief page 23). In the case *Winklebleck v. City of Portland,* 31 Pac. (2d) 637, a contract was entered into by ordinance. The city by ordinance accepted an offer made it according to the case. Nothing in the record of the case at bar supports any contention that the City accepted any offer by ordinance. The case cited is clearly distinguishable from the instant case. It should be further pointed out that neither the affidavit of Carr (TR page 15) nor Rozell (TR page 17) indicates any vote taken on an agreement or offer to pay Appellant.

## CONCLUSIONS.

1. Based on the arguments of Appellee that no valid enforceable contract existed between plaintiff below and defendant below, and

2. Appellant's brief is in no way directed at the specification of error urged by him, and such specification is not properly set out,

3. The cases cited by Appellant do not controvert the law nor are they applicable to the facts supporting the motion for Summary Judgment,

It is therefore urged that the District Court made no error in granting Summary Judgment for the defendant below and the Appellee prays that the Judgment of that Court be affirmed.

Dated, Anchorage, Alaska,
February 5, 1957.

Respectfully submitted,

JAMES M. FITZGERALD,
City Attorney of the City of Anchorage,

L. EUGENE WILLIAMS,
Assistant City Attorney of the City of Anchorage,

*Attorneys for Appellee.*

No. 15238

# United States Court of Appeals

for the Ninth Circuit

WESTERN MACHINERY COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Appellee.

# Transcript of Record

**Appeal from the United States District Court for the Western District of Washington, Northern Division.**

FILED
DEC - 3 1956
PAUL P. O'BRIEN

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-19-56

No. 15238

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF COUNSEL

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San Francisco, California;

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Seattle, Washington,

Attorneys for Appellant.

DEAN H. EASTMAN and
ROGER J. CROSBY,
909 Smith Tower,
Seattle 4, Washington,

Attorneys for Appellee.

In the United States District Court for the Western District of Washington, Northern Division

Civil Action No. 3878

WESTERN MACHINERY COMPANY, a Corporation,

Plaintiff,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Defendant.

## COMPLAINT FOR GOODS SOLD AND DELIVERED

Complaining of Defendant, Plaintiff alleges:
For Its First Count:

I.

That Plaintiff is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and duly authorized to and doing business as such foreign corporation in the State of Washington, and is a citizen and resident of the said State of Utah.

II.

That Defendant is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of the said State of Delaware, doing business in the District aforesaid.

III.

That within 3 years last past, Defendant became indebted to Plaintiff for goods, wares and merchandise sold and delivered by said Plaintiff to said Defendant at Defendant's special instance and request, in the sum of $71,038.71, which was and is the reasonable value thereof.

IV.

That notwithstanding due demand therefor has been made no part of said sum of $71,038.71 has been paid, saving and excepting the sum of $22,089.76, and that the balance thereof, to wit, the sum of $48,948.95, is now due, owing, payable and unpaid from said Defendant to Plaintiff herein.

Wherefore, Plaintiff prays judgment.

For Its Second Count:

I.

That each and all the allegations contained in Plaintiff's foregoing paragraphs I and II are true, are hereby expressly referred to and made part of this, its second count.

II.

That within 3 years last past Defendant became indebted to Plaintiff for goods, wares and merchandise sold and delivered by Plaintiff to Defendant at Defendant's special instance and request in the sum of $71,038.71, which said sum Defendant then and there promised and agreed to pay to Plaintiff therefor.

III.

That notwithstanding due demand therefor has been made no part of said sum of $71,038.71 has been paid, saving and excepting the sum of $22,-089.76, and that the balance thereof, to wit, the sum of $48,948.95, is now due, owing, payable and unpaid from said Defendant to Plaintiff herein.

Wherefore, Plaintiff prays judgment against Defendant in the sum of $48,948.95, plus legal interest thereon, plus Plaintiff's costs incurred herein, and for all proper relief.

KARR, TUTTLE &
CAMPBELL,

By /s/ CARL G. KOCH;

SHAPRO & ROTHSCHILD,

By /s/ ARTHUR P. SHAPRO,
Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed February 9, 1955.

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[Title of District Court and Cause.]

## AMENDED ANSWER

Comes now the defendant, and for amended answer to the first count of plaintiff's complaint admits, denies and alleges as follows:

I.

The defendant does not have sufficient informa-

tion to form a belief as to the truth or falsity of the allegations contained in paragraph I thereof, and therefore denies the same.

II.

The defendant admits the allegations contained in paragraph II thereof.

III.

The defendant denies the allegations contained in paragraphs III and IV thereof.

By way of affirmative defenses to the first count of plaintiff's complaint, the defendant alleges as follows:

I.

That if plaintiff sold or delivered any goods, wares or merchandise at the instance and request of defendant, defendant was not liable therefor, for the reason that there was no consideration running to defendant for the assumption of any liability for such sale or delivery of goods, wares or merchandise.

II.

Assuming, but without admitting, that defendant requested plaintiff to deliver goods, wares and merchandise, such request was on behalf of Bellingham Coal Mines Company, and any assumption by defendant of the obligation to pay for said goods, wares and merchandise was not in writing and comes within the statute of frauds.

III.

Assuming, but without admitting, that defendant became indebted to plaintiff for any sum whatsoever, plaintiff subsequently took a promissory note from the Bellingham Coal Mines Company covering such alleged indebtedness of defendant without reserving any rights against defendant, and the taking of said note resulted in a novation releasing defendant from any alleged obligation to plaintiff.

IV.

Assuming, but without admitting, that defendant became indebted to plaintiff for any sum whatsoever, defendant's liability, if any, was as a surety for the obligations of Bellingham Coal Mines Company, and that plaintiff's action of extending the time of payment for the Bellingham Coal Mines Company discharged and released defendant from any alleged obligation to plaintiff.

For amended answer to the second count of plaintiff's complaint, defendant admits, denies and alleges as follows:

I.

In answer to paragraph I thereof, defendant expressly refers to and makes a part of this amended answer to said second count each and all of the admissions, denials and allegations contained in paragraphs I and II of defendant's foregoing amended answer to said first count.

II.

The defendant denies the allegations contained in paragraphs II and III thereof.

ties having been submitted by both parties and having been considered by the Court, and the Court having listened to argument of counsel and having rendered its oral opinion herein and the Court being fully advised in the premises, now makes and enters the following

## Findings of Fact

### I.

That plaintiff is, and at all times herein mentioned, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, and doing business as such foreign corporation in the State of Washington; that defendant is, and at all times herein mentioned, a Delaware corporation doing business in the State of Washington.

### II.

That plaintiff sold and delivered coal-washing machinery to Bellingham Coal Mines Company for use in its coal mine at Bellingham, Washington, upon a written price quotation dated February 20, 1952, from plaintiff, signed by defendant, introduced in evidence as plaintiff's Exhibit Number 1, and a written acceptance dated February 25, 1952, from the defendant, Northwestern Improvement Company, as the operating manager of Bellingham Coal Mines Company, which acceptance was introduced in evidence as plaintiff's Exhibit Number 2. That even though said quotation of February 20, 1952, and the acceptance of February 25, 1952, were in defendant's name, plaintiff at all times knew, as

explained in Exhibit Number 2, that said coal-washing plant was for the use of Bellingham Coal Mines Company and that Bellingham Coal Mines Company would receive the entire benefit of said coal-washing plant.

III.

That by said quotation dated February 20, 1952, and said acceptance dated February 25, 1952, the defendant, to expedite the delivery of said coal-washing plant to Bellingham Coal Mines Company, as purchaser, lent its name for credit purposes only and thereby became a surety for Bellingham Coal Mines Company to pay for the purchase price of said coal-washing plant as shown on Exhibits 1 and 2.

IV.

That the defendant did not have any agreement with said Bellingham Coal Mines Company to receive, nor did defendant receive, any money or other consideration as a result of the purchase of said coal-washing plant or for the act of becoming a surety for said Bellingham Coal Mines Company in the purchase of said plant. Defendant's assumption of liability for the purchase price of said coal-washing plant delivered to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1 and 2 was without consideration to defendant.

V.

That by reason of the purchase and sale of said coal-washing plant, the Bellingham Coal Mines Company became indebted to plaintiff in the sum

of $71,038.71, for which amount defendant was surety; that said account was due and payable on or before the 31st day of July, 1952; that on or about August 15, 1952, Bellingham Coal Mines Company paid $15,000.00 to plaintiff in reduction of the account for which defendant was surety. That subsequent to November 18, 1952, Bellingham Coal Mines Company paid on the obligation for which defendant was surety, the additional sum of $7,593.24, leaving $48,445.47 unpaid.

VI.

That on or shortly before August 15, 1952, plaintiff requested from Bellingham Coal Mines Company a conditional bill of sale to the coal-washing plant. That prior to August 20, 1952, plaintiff renewed said request, and as an alternative suggested a chattel mortgage. Such conditional bill of sale or chattel mortgage were never given. On or about August 23, 1952, Bellingham Coal Mines Company transmitted to plaintiff by mail a promissory note dated August 20, 1952, Exhibit A-6, which plaintiff accepted. The Court finds that no additional consideration in fact was paid or received by defendant on account of, and that defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note.

VII.

That on or about the 23rd day of August, 1952, Bellingham Coal Mines Company delivered, and plaintiff accepted, a promissory note, Exhibit A-6,

covering the unpaid balance for said coal-washing plant; that by said promissory note, plaintiff extended to Bellingham Coal Mines Company, without the consent or approval of defendant, the time for payment of the balance due on said coal-washing plant to November 18, 1952.

VIII.

That at all times material hereto Earl R. McMillan was Manager of Coal Operations of defendant, and the only official of this company located in this state.

IX.

That at all times material hereto defendant was operating manager of Bellingham Coal Mines Company and Earl R. McMillan served as general manager, vice president and member of the board of directors of Bellingham Coal Mines Company.

X.

That on or about August 29, 1952, Bellingham Coal Mines Company by Earl R. McMillan, its general manager, certified that the installation of the coal-washing plant was complete and that it was operating satisfactorily.

Conclusions of Law

From the foregoing facts, the Court concludes:

I.

That the subject matter of the action and the parties hereto are within the jurisdiction of this Court.

II.

That plaintiff sustained the burden of proof to the extent that it sold and delivered goods, wares and merchandise of the reasonable value of $71,-038.71 to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1, 2 and 4, for which sale defendant became a surety to plaintiff for the sum of $71,038.71; that there is presently due and owing $48,445.47 of the amount for which defendant was surety.

III.

That defendant was a surety for Bellingham Coal Mines Company, and Bellingham Coal Mines Company was the principal, in the purchase of a coal-washing plant by said Bellingham Coal Mines Company from plaintiff on or about February 25, 1952.

IV.

That defendant sustained the burden of proof under its first affirmative defense to both first and second counts of plaintiff's complaint; that defendant did not, nor was defendant entitled to, receive any consideration for the assumption of liability as a result of the purchase by Bellingham Coal Mines Company of said coal-washing plant from plaintiff.

V.

That defendant failed to sustain the burden of proof as to its second and third affirmative defenses to both first and second counts of plaintiff's complaint.

VI.

That defendant has sustained the burden of proof as to its fourth affirmative defense to both first and second counts of plaintiff's complaint. That by a valid agreement, plaintiff, without reserving any rights it may have had against defendant, extended to defendant's principal, Bellingham Coal Mines Company, the time for payment of the balance due on the purchase of said coal-washing plant, for which obligation defendant was a surety, thereby discharging the defendant from its obligation as surety.

VII.

That a judgment and decree should be entered herein, dismissing all counts of plaintiff's complaint, with prejudice, and that the defendant is entitled to have a judgment against the plaintiff for its costs and disbursements herein.

Done in open Court this 22nd day of June, 1956.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ROGER J. CROSBY,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1956.

In the District Court of the United States for the Western District of Washington, Northern Division

[Title of Cause.]

Before: Judge Bowen.

Friday, June 15, 1956

## COURT'S ORAL OPINION

The Court: In this case from a preponderance of the evidence the Court finds, concludes and decides as follows:

That of the four affirmative defenses pleaded by defendant against the plaintiff's complaint, each of which four affirmative defenses is alike and the same as to each of the two so-called counts of plaintiff's complaint, defendant has sustained its burden of proof as to the first of such affirmative defenses, in that there is no convincing evidence in this case that the defendant would have received any more money as a result of this contract than it would have received without a contract, and it is not established what sum or sums of money or the nature of what other profits would have or might have been sustained by this contract for the purchase and sale of machinery in addition to what the defendant might have received in the course of its relationship with the Bellingham Coal Mines.

That as to the second affirmative defense the defendant has failed to establish the same, there being undeniable evidence that the defendant by its cor-

porate official, Mr. McMillan, did in fact approve of the transaction in writing as appears in the lower left-hand corner of Plaintiff's Exhibit 1.

That as to the third affirmative defense the defendant has not sustained its burden of proof to establish the alleged novation, in that the Court is not convinced by any credible evidence that any consideration of any name or nature was offered to or received by defendant on account of, or that defendant consented or approved, the execution by Bellingham Coal Mines Company of the promissory note described in said third affirmative defense.

As to the fourth and last of said affirmative defenses, that the defendant has sustained its burden of proof, in that, as the Court is convinced and finds, concludes and decides from a preponderance of the evidence, it was at all times expressly understood that the contract for the purchase and sale of the machinery in question was for the account of and to be used by the Bellingham Coal Mines Company and not by the defendant Northwestern Improvement Company, and that in approving the express substitution of the defendant Northwestern Improvement Company for and in the stead of Bellingham Coal Mines Co., Inc., it was for the express purpose of, as clearly indicated by the testimony of both Mr. Huckaba for the plaintiff and by Mr. McMillan for the defendant, the sole accommodation and benefit of the Bellingham Coal Mines Company.

In this connection the Court is convinced by and finds from a preponderance of the evidence that as

a proximate result of the purchase and sale of this coal-washing machinery the defendant did not receive and was not expected to receive a single dollar of compensation or profit which it was not already entitled to receive. The commission of 20 per cent of the salary of Mr. McMillan and other employees of the defendant company for allocating part of their services to the coal operations of the Bellingham Coal Mines Company was not in any way increased or expected to be increased by reason of this purchase and sale contract, and there is no proof in the record that the defendant company profited or was to profit by any additional freight earnings which the Northern Pacific Railway Company might have received for the shipment of this coal-washing machinery.

I do not recall any evidence in this record on the question of ownership of the defendant or corporate relationship between the Northern Pacific Railway and the defendant.

Mr. Shapro: Oh, yes, your Honor, there is. May I interrupt just a moment?

The Court: Yes, you may.

Mr. Shapro: All of the exhibits that are on the letterhead of Northwestern Improvement Company have right under it printed there, "A subsidiary of Northern Pacific Railroad."

The Court: Very well. Then that letterhead statement is evidence of the fact that the defendant is a corporation owned by another corporation, the Northern Pacific Railway Company. One would infer from that, if any inference should be made

from the corporate relationship, that the Railway Company and not the Improvement Company would benefit by the mere fact of that relationship. Whatever earnings the subsidiary might make might in some way redound to the financial benefit of the Railway Company, but it does not follow that merely because the defendant Improvement Company is a subsidiary of the Railway Company that the subsidiary would receive some profits by some operations of the Railway Company. It would seem to be that the inference would be the reverse.

To that situation which the Court has stated the Court finds, as in effect is alleged in the fourth affirmative defense of defendant, amounted to nothing more than that by signing the contract the defendant thereby lent its name and credit for the benefit exclusively of the Bellingham Coal Mines Company is applicable the following language taken from the case of Hoffman vs. Habighorst, 28 Wash. 261, as the same is cited in the Howell case, 71 Fed. 2d 237, at 243:

> " 'If a promise be made for the benefit of another, without sharing in the consideration, the promisor will be a surety, whatever may be the form of the agreement. * * *' "

The Court further so finds, concludes and decides that in reality the relationship between the defendant and Bellingham Coal Mines Company with respect to the purchase and sale of this machinery was one of suretyship; that the Bellingham Coal Mines Company was the principal, a fact well

known to all parties at all times material to this action, and all knew that the substitution on the contract of sale and purchase of the purchaser from the Bellingham Coal Mines Company to the defendant Improvement Company was for the sole benefit of the principal, the Bellingham Coal Mines Company, was without any consideration to the defendant company, and was in effect a pledging of the credit of the defendant company for the sole benefit of the Bellingham Coal Mines Company;

That the time extension by plaintiff for the payment by the principal of its debt to the plaintiff was effected by arrangement between the principal, the Bellingham Coal Mines Company, and the plaintiff without the consent or approval of the defendant, the surety, and that occurrence releases the defendant surety, the Northwestern Improvement Company, from whatever obligation it previously had to the plaintiff on account of the transactions alleged in plaintiff's complaint — a result which would not be changed even if defendant had been a compensated surety;

That plaintiff take nothing in respect to its first cause of action in its complaint filed herein February 9, 1956, and that it take nothing on account of its second cause of action in that complaint.

The Court by the words "cause of action" in each instance refers to what plaintiff denominates "Plaintiff's first count" in plaintiff's complaint and also to what plaintiff denominates its "second count" in its complaint.

And further the Court decides that said complaint

as to both of said counts and causes of action should be dismissed with prejudice and with taxable costs in favor of the defendant and against the plaintiff.

The Court's future calendar is so arranged that it is going to be very difficult to settle the Findings of Fact, Conclusions of Law and Judgment on a date later than the 22nd day of June. Today is the 15th. Can the prevailing party's counsel prepare and serve on opposing counsel their proposed Findings of Fact, Conclusions of Law and Judgment by Monday afternoon at the close of business?

Mr. Crosby: Yes, your Honor, that can be done.

The Court: Then if that is done the Court will give to counsel either the 20th or the 22nd to settle the Findings and Conclusions. Which do you prefer?

Mr. Shapro: The 22nd, may we have, your Honor?

The Court: It will be at ten o'clock in the forenoon.

Mr. Shapro: Thank you.

Mr. Crosby: Thank you, your Honor.

The Court: Counsel are excused until then and all the witnesses are excused.

[Endorsed]: Filed June 22, 1956.

United States District Court for the Western District of Washington, Northern Division

Civil Action No. 3878

WESTERN MACHINERY COMPANY, a Corporation,

Plaintiff,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Defendant.

## JUDGMENT

This Matter having come duly and regularly on for trial before the undersigned Judge of the above-entitled Court on the 13th day of June, 1956, and the plaintiff being represented by Messrs. Arthur P. Shapro, of Shapro and Rothschild, and Carl G. Koch, of Karr, Tuttle and Campbell, its attorneys of record, and the defendant being represented by Roger J. Crosby, one of its attorneys of record, and thereafter, evidence, both oral and documentary, having been received and memorandum of authorities having been submitted by both parties and having been considered by the Court, and the Court having listened to argument of counsel and having rendered its oral opinion and the Court having signed and entered its Findings of Fact and Conclusions of Law herein,

Now, Therefore, It Is Ordered, Adjudged and

Decreed that all counts of plaintiff's complaint herein be, and the same are, hereby dismissed with prejudice; and

It Is Further Ordered, Adjudged and Decreed that the defendant, Northwestern Improvement Company, have judgment against the plaintiff, Western Machinery Company, for its costs and disbursements herein.

Done in open Court this 22nd day of June, 1956.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ ROGER J. CROSBY,
Of Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1956.

Entered June 25, 1956.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice is hereby given that Western Machinery Company, a corporation, plaintiff above named, hereby appeals to the United States Court of Ap-

peals, Ninth Circuit, from the final judgment entered in this action on June 22, 1956.

Dated this 16th day of July, 1956.

SHAPRO & ROTHSCHILD and

KARR, TUTTLE & CAMPBELL,

By /s/ CARL G. KOCH,

Attorneys for Appellant, Western Machinery Company.

[Endorsed]: Filed July 16, 1956.

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[Title of District Court and Cause.]

## ORDER DIRECTING TRANSMISSION OF ORIGINAL EXHIBITS

This Matter coming on for hearing in open court on the application of plaintiff for an order directing transmission of all exhibits admitted into evidence in the above cause to the United States Court of Appeals for the Ninth Circuit as part of the record on appeal of the above cause, and it appearing to the court that plaintiff has filed its Designation of Contents of Record on Appeal designating for inclusion in the record all of said exhibits, now, therefore,

It Is Hereby Ordered that the clerk of the above-entitled court be and hereby is directed to transmit to the United States Court of Appeals for the Ninth

Circuit, as part of the record on appeal in the above cause, all of the exhibits admitted in evidence in said cause.

Done in Open Court this 20th day of July, 1956.

/s/ JOHN C. BOWEN,
Judge.

Presented by:

/s/ COLEMAN P. HALL,
Of Karr, Tuttle & Campbell,
Attorneys for Plaintiff.

Approved as to Form:

/s/ ROGER J. CROSBY,
Of Attorneys for Defendant.

[Endorsed]: Filed July 20, 1956.

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In the District Court of the United States for the Western District of Washington, Northern Division

Civil Action No. 3878

WESTERN MACHINERY COMPANY, a Corporation,

Plaintiff,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Defendant.

## STATEMENT OF FACTS

Be It Remembered, that the above-entitled and numbered cause was heard before the Honorable

John C. Bowen, one of the Judges of the above-entitled Court, at Seattle, Washington, beginning Wednesday, June 13, 1956, at 2:10 o'clock p.m.

The plaintiff was represented by Mr. Arthur P. Shapro, of Messrs. Shapro & Rothschild, Attorneys at Law of San Francisco, California, and Mr. Carl G. Koch, of Messrs. Karr, Tuttle & Campbell, Attorneys at Law of Seattle, Washington.

The defendant was represented by Mr. Roger J. Crosby, Attorney at Law of Seattle, Washington.

Whereupon, the following proceedings herein were had and done, to wit:

The Court: In the case entitled Western Machinery Co., a corporation, versus Northwestern Improvement Co., a corporation, No. 3878, are counsel and the parties ready to proceed with that trial?

Mr. Shapro: We are ready, your Honor.

Mr. Crosby: The defendant is ready, your Honor.

The Court: What arrangements have you for trial? Mr. Koch, are you going to be responsible for the trial, or do you ask that somebody else be?

Mr. Koch: I would like that Mr. Shapro be extended the privilege of participating in the trial by this Court.

The Court: I believe it has previously been stated in court that he is a member in good standing of the bar of the State of California.

Mr. Koch: Yes, your Honor.

Mr. Shapro: And of the Court of Appeals for the Ninth Circuit, your Honor.

The Court: What about the local trial Federal Court?

Mr. Shapro: Not in this District, your [2*] Honor.

Mr. Koch: In San Francisco.

Mr. Shapro: Oh, in San Francisco, yes, your Honor.

The Court: In other words, you are a member of the bar of the Northern District of California?

Mr. Shapro: With the Northern and Southern Districts of California and with the District of Nevada.

The Court: Your request is granted, Mr. Koch.

Mr. Koch: Thank you, your Honor.

The Court: And Mr. Shapro may act actively as a trial attorney in this case assisted by Mr. Koch if that is their wish. It would be in order at this time to hear plaintiff's opening statement. I will hear you from your present station.

Mr. Shapro: Your Honor, this action is one for goods allegedly sold and delivered by the plaintiff to the defendant Northwestern Improvement Company, the original sale having been made for the sum of $71,038.71 on account of which there has been paid to the plaintiff the sum of $22,089.76, leaving a balance on the purchase price for which this action is brought of $48,948.95.

The facts, your Honor, very briefly, which we propose to prove in support of the allegations of our complaint are these:

On or about the 20th day of February, 1952, [3]

***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

the defendant through the manager of its coal operations in this state, one Earl R. McMillan, gave to the plaintiff a written order for the purchase of certain equipment, which I think throughout this trial will probably be referred to for brevity's sake as a coal-washing plant, for the total sum originally of $63,680, but which by reason of various changes in specifications and additions to the list ultimately together with freight and sales tax charges amounted to the $71,000 figure mentioned by me a few moments ago. That written order given to the plaintiff by the defendant was confirmed in writing by the defendant through the same Mr. McMillan, manager of its coal operations, by a letter dated February 25, 1952, the written order dated February 20, 1952, having been delivered to the plaintiff on February 22, 1952. So far as the plaintiff is concerned the equipment in question was delivered in accordance with the written order of the defendant and it has not been paid for to the extent of the principal of the prayer of the plaintiff's complaint.

That, your Honor, in substance is the plaintiff's case.

The Court: The defendant at this time or, if it prefers, later on at a proper stage in the proceedings, may make defendant's opening statement [4] of what it thinks the proof will be.

Mr. Crosby: I would like to reserve my statement until the end of plaintiff's case.

The Court: That may be done.

Mr. Shapro: With the Court's permission, then, your Honor, the plaintiff will call as its first witness Mr. Stanley Huckaba.

The Court: Come forward and be sworn as a witness.

J. STANLEY HUCKABA

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shapro:

Q. Will you state your full name, sir?

A. J. Stanley Huckaba.

The Court: How do you spell the last name?

A. H-u-c-k-a-b-a.

Q. (By Mr. Shapro): Where do you reside, Mr. Huckaba?

A. In Spokane, Washington.

Q. And for how long have you lived in the State of Washington?

A. Approximately seven years.

Q. Addressing your attention to the year 1952, what was [5] your employment?

A. I was engaged by the Western Machinery Company as sales engineer for the northwest district and part of Canada.

Q. What then and now is your professional occupation? A. Professional occupation?

Q. Yes.

A. I'm a metallurgical engineer.

Q. During the year 1952, and addressing myself to the early part of that year, Mr. Huckaba, as you have stated you were employed by Western Machinery Company, did you have occasion to meet

(Testimony of J. Stanley Huckaba.)

and have any business transactions with Mr. Earl R. McMillan? A. Yes, sir.

Q. And where did those transactions or negotiations take place?

A. Generally in Mr. McMillan's office.

The Court: Where?

A. In the Smith Tower. 1012, I believe it is, Smith Tower.

Q. (By Mr. Shapro): In Seattle, sir?

A. In Seattle, Washington.

Q. In general will you tell the Court, please, the nature of the business transactions that you had with Mr. McMillan at that time? [6]

A. At any specific time are you referring to?

Q. In January and February of 1952.

A. They were regarding the sale of a coal-washing plant to the—which was to be installed at Bellingham, Washington.

Q. Did you subsequently make a written quotation and offer to sell the coal-washing plant in question? A. Yes, sir.

The Clerk: It will be Plaintiff's Exhibit No. 1.

(A two-page quotation dated February 20, 1952, was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Shapro): The bailiff, Mr. Huckaba, is presenting to you a document which purports to be a quotation in connection with certain equipment that is described therein and which document is dated February 20, 1952. Is the document which

(Testimony of J. Stanley Huckaba.)

you now hold in your hands the quotation made by you to Mr. McMillan and to which you have just testified? A. Yes, sir, it is.

The Court: Avoid leading.

Q. (By Mr. Shapro): Mr. Huckaba, referring your attention to the document, will you tell the Court, please, with what difference, if any, the document you hold in your [7] hands was first presented to Mr. McMillan?

A. Will you repeat your question, please?

The Court: Read it, Mr. Reporter.

(The reporter read the last question.)

The Court: Any kind of difference is referred to that pertained to that thing.

A. Well, the document was written to the Bellingham Coal Mines Company, Incorporated, and it is the plant that was sold subsequently, and——

The Court: To whom, if you know, was it sold?

A. Well, under my——

The Court: No, if you know the answer, state it. If you don't, don't state any answer. I don't want any explanation.

A. To the Northwestern Improvement Company.

Q. (By Mr. Shapro): Mr. Huckaba, was the signature of Mr. McMillan and the rubber stamp, "Northwestern Improvement Company, Manager of Coal Operations," which appears in the lower left-hand corner of both pages of the document you have in your hand, on the document when you first transmitted it to Mr. McMillan? A. No, sir.

Q. When did you receive the document, if you

(Testimony of J. Stanley Huckaba.)

recall, in the condition in which you now see it?

A. We had a discussion in Mr. McMillan's [8] office——

The Court: Could you just state exactly when it was? If you can, do it without discussion. Counsel will ask you a question that calls for discussion if he wishes.

A. I do not recall the exact date.

The Court: Can you fix it approximately with reference to any other date that you do know, or any other occurrence which you do know? If so, fix it in that manner.

A. Well, it was sometime after February 20, 1952, when I wrote my quotation that it was delivered back to me.

The Court: What kind of occasion was it associated with, if anything may be associated in your mind, with that delivery occurrence you have just mentioned? Did it happen with reference to your doing anything or being anywhere at any time?

A. Yes, I was in Seattle at that time specifically to call on Mr. McMillan.

The Court: Was that the very next time after the first one you mentioned or was it not the first time?

A. No, it was not the first time. I had made a number of calls on Mr. McMillan prior.

The Court: How much time, about, elapsed, [9] if you know, between the two occasions you have mentioned, first the one when you first called on

(Testimony of J. Stanley Huckaba.)

Mr. McMillan in this matter and the second when you received from him this exhibit?

A. Well, as I recall it was a matter of months between the time I first called on Mr. McMillan in regard to this specific case and the time the order was placed.

The Court: You may inquire.

Q. (By Mr. Shapro): Mr. Huckaba, the quotation that you hold in your hand dated February 20, 1952, was given or sent to Mr. McMillan when?

Mr. Crosby: I object to that as leading.

The Court: That is leading and the objection is sustained because of it.

Q. (By Mr. Shapro): When if you know was the quotation dated February 20, 1952, which you hold in your hand delivered or transmitted to Mr. McMillan by you?

A. I do not recall the exact date it was given to him.

The Court: I think the question would call for giving your best information.

A. Within a day or two after the quotation was written I'm sure it was delivered to Mr. McMillan.

The Court: You may inquire.

The Clerk: Plaintiff's Exhibit No. 2. [10]

(A letter dated February 25, 1952, from Earl R. McMillan to Western Machinery Co. was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Shapro): Referring your attention

(Testimony of J. Stanley Huckaba.)
for a moment again, Mr. Huckaba, to Plaintiff's Exhibit No. 1, the question, will you observe the rubber stamp in the upper right-hand corner and tell the Court if you know the meaning of that date in the position in which it is on that document?

A. Well, the rubber stamp is evidently the stamp of Western——

The Court: No, it is what you know it to be. What significance does it have on there, is the import of his question.

A. It means it was received by Western Machinery Company on a certain date, February 25, 1952, in their office in San Francisco.

Q. (By Mr. Shapro): Now, Mr. Huckaba, referring your attention to Plaintiff's Exhibit No. 2, which purports to be a letter on the letterhead of Northwestern Improvement Company addressed to Western Machinery Company dated February 25, 1952, do you recognize that document?

A. Yes, sir, I do.

Q. Was it received by you in the Spokane office of Western Machinery Company? [11]

A. It was mailed to me in the Spokane office, yes.

Q. And received there by you?

A. Yes, sir.

Q. And does that document refer by description only to the subject matter of Plaintiff's Exhibit No. 1? A. Yes, sir.

Mr. Shapro: Your Honor, at this time for the record we offer and ask that they be received in

(Testimony of J. Stanley Huckaba.)

evidence as Plaintiff's exhibits both Items 1 and 2.

Mr. Crosby: I have no objection.

The Court: Each of them is now admitted.

(Plaintiff's Exhibits Nos. 1 and 2 for identification were admitted in evidence.)

The Court: Mr. Huckaba, what do you call Plaintiff's Exhibit 2? Does it have a name that reasonably reflects the contents of the document, Plaintiff's Exhibit 2? What do you call it, the shortest name you can think of that reflects the nature of the contents?

A. A letter confirming the order placed on February 20th.

The Court: That is sufficient.

Q. (By Mr. Shapro): Mr. Huckaba, do you know of your own knowledge that the equipment described in Plaintiff's Exhibits 1 and 2 was delivered to the Bellingham Coal [12] Mine at Bellingham, Washington?

A. Yes, sir, it was delivered and placed in operation.

Q. Referring your attention to the amounts of money referred to in both Exhibits 1 and 2 and by reason of your familiarity which you testified to as a metallurgical engineer, with the subject matter thereof, was the purchase price or sales price as indicated in Exhibits 1 and 2 at that time in your opinion fair and reasonable? A. Yes, sir.

The Court: How much was the sale price, Mr. Huckaba, the total sale price that you expected the

(Testimony of J. Stanley Huckaba.)

buyer to pay to your principal, Western Machinery Company? A. The sum was $63,680, no cents.

The Court: 63 thousand——

A. $63,680 and no cents.

The Court: Any may I refer to that as the total sales price which you expected to receive or contracted to receive?

A. At that time, yes.

The Court: You may inquire.

Q. (By Mr. Shapro): Mr. Huckaba, do you know of your own knowledge whether or not there were any additions to the equipment specified in Exhibits 1 and 2? [13]

A. Yes, sir, there were two additions.

Q. And can you tell the Court in general the nature of the additions?

A. There were two spirals or coal dewatering devices sold after that time. I believe——

Q. And——

The Court: Just a moment.

Mr. Shapro: Excuse me.

The Court: Two what, now?

A. Coal dewatering, spirals.

The Court: Is that one or more than one?

A. It would be two items.

The Court: Two items of—what do you call them?

A. I called them coal spirals. They are called dewatering devices.

The Court: Dewatering spirals, is that right?

A. Yes, that's right, coal dewatering spirals.

(Testimony of J. Stanley Huckaba.)

The Court: And then were there any other additions or are those the two additions you meant?

A. Well, there were supplies also sold to the—sold thereafter, which I presume is—excuse me—which must have been added to the total to make the total price. [14]

Q. (By Mr. Shapro): Do you recall, Mr. Huckaba, the sales price of the two dewatering spirals to which you have referred?

A. I do not.

Mr. Shapro: At this time, Mr. Crosby, may I ask if there is any question or contention so far as the defendant is concerned as to the amount of the original sale and the amount of the payments received and the balance?

Mr. Crosby: I don't believe so, except that I think that we should introduce a short accounting showing the sale price, and——

Mr. Shapro: The invoices will come in. I merely wanted to go into that while this witness is here if there was any question because he is the one who can tell us. So far as the figures are concerned we have the details.

Mr. Crosby: No, I don't think there will be any question about the amounts.

Mr. Shapro: I have no further questions, your Honor, of this witness.

The Court: Is there any cross-examination?

Mr. Crosby: Yes, your Honor.

The Court: You may proceed with that. [15]

(Testimony of J. Stanley Huckaba.)

Cross-Examination

By Mr. Crosby:

Q. Mr. Huckaba, approximately how many times did you come to Seattle and talk to Mr. McMillan prior to February 22, 1952, that is, talk to Mr. McMillan in connection with the machinery which was to be placed in the Bellingham Coal Mine?

A. I don't recall the exact number, but it was several times.

Q. Several times. And during those times isn't it true that you were advised by Mr. McMillan that the Bellingham Coal Mine Company was a separate company from the Northwestern Improvement Company?

Mr. Shapro: Your Honor, I object to that question upon the ground that it is incompetent, irrelevant and immaterial and that it is an attempt to violate the parol evidence rule and to vary the terms of a written instrument by parol.

The Court: I don't think it is within the scope of the direct examination. If he wishes to make this witness his own witness, that might be another matter.

Mr. Crosby: Your Honor, this witness testified that the machinery was delivered to the Bellingham Coal Mine Company. [16]

The Court: Then the Court's statement was inappropriate, was inaccurate, and the objection is overruled. As to what the agreement may be, your

(Testimony of J. Stanley Huckaba.)

objection may be good. I don't know about that yet.

Q. (By Mr. Crosby): Do you have in mind the question, Mr. Huckaba?

The Court: Read the question, if unanswered.

(The reporter read the last question as follows:

("Q. And during those times isn't it true that you were advised by Mr. McMillan that the Bellingham Coal Mine Company was a separate company from the Northwestern Improvement Company?")

A. That's correct.

Q. (By Mr. Crosby): And weren't you also advised that the Northwestern Improvement Company had been employed by the Bellingham Coal Mine Company to manage and operate the Bellingham Coal Mine at Bellingham, Washington?

Mr. Shapro: The same objection, your Honor.

The Court: That objection is overruled.

A. I had been told they were employed to manage the company. Under what conditions I wasn't informed.

Q. (By Mr. Crosby): You were also aware, were you not, [17] that the Bellingham Coal Mine Company had to give its approval of the purchase of this equipment?

Mr. Shapro: I object to that question, if your Honor please, upon the ground that it is not within the scope of the direct examination, calls for the

(Testimony of J. Stanley Huckaba.)

opinion and conclusion of the witness, is incompetent, irrelevant and immaterial.

Mr. Crosby: Your Honor, this witness stated that the machinery was sold to the Northwestern Improvement Company. I wanted to bring out that this witness was fully aware that the sale was actually to the Bellingham Coal Mine Company.

Mr. Shapro: That, your Honor, is a conclusion of law. That is the very issue your Honor is going to have to pass upon at the conclusion of this case.

The Court: The objection is overruled.

A. The question again, please.

The Court: Read the question.

(The reporter read the question as follows:

("Q. You were also aware, were you not, that the Bellingham Coal Mine Company had to give its approval of the purchase of this equipment?")

A. I do not recall. [18]

Mr. Crosby: Mr. Shapro, might I have Mr. Huckaba's sales report of January 23, 1952, and the sales report of February 16, 1952?

Mr. Shapro: February 16, '52 (handing paper to Mr. Crosby). What is the other date, sir?

Mr. Crosby: January 23, 1952, marked "Received January 25, 1952."

Mr. Shapro: I have it (handing paper to Mr. Crosby).

Q. (By Mr. Crosby): Mr. Huckaba, also didn't you consider attending a Board of Directors meet-

(Testimony of J. Stanley Huckaba.)

ing of the Bellingham Coal Mine Company for the purpose of explaining their purchase of this equipment?

Mr. Shapro: To which question we object, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial, calls for the opinion and conclusion of the witness.

The Court: That objection is overruled. If you can answer, do so.

A. Under the duties of my job—I do not recall the specific instance, but under the duties of my job at that particular time I would have attended a meeting had they asked me to.

The Clerk: Defendant's No. A-1.

(A sales report, dated January [19] 23, 1952, was marked Defendant's Exhibit No. A-1 for identification.)

Q. (By Mr. Crosby): Mr. Huckaba, would you please refer to Defendant's Exhibit A-1 and advise the Court what that is?

A. This is a sales report form supplied me by the company whose employ I was then in upon which we wrote our reports and sent them in to San Francisco.

Q. That report is dated January 23, 1952?

A. That is correct. Received——

Q. And the writing on the form was made by you? A. That is correct.

Q. Would you please read the last paragraph of that report?

(Testimony of J. Stanley Huckaba.)

The Court: It is not in evidence.

Mr. Shapro: No.

The Court: You cannot do that yet. Did anyone sign it, Mr. Huckaba?

A. Pardon?

The Court: Did anyone sign that paper, Defendant's Exhibit A-1, the sales report you just mentioned?

A. It's signed by myself, yes.

Q. (By Mr. Crosby): This report pertains, does it not, to the equipment that you have been testifying about on the stand? [20]

A. I do not believe it does.

Q. Wasn't this report made in connection with your negotiations with Mr. McMillan?

A. In connection with my negotiations with Mr. McMillan during which several quotations were made.

Q. Yes. Pertaining to the coal washing equipment which was to be installed in the Bellingham Coal Mine?

A. During the process of the selling of the equipment a number of discussions were had and a number of quotations were made. Just how many, I——

The Court: What do you mean by "a number of quotations"? Do you mean about the same merchandise or contemplated sale of merchandise?

A. Not about the same merchandise, but the size of the equipment. In the planning of their plant we made recommendations and prices of a

(Testimony of J. Stanley Huckaba.)

number of different sizes or styles of equipment.

Q. (By Mr. Crosby): But all of this equipment was to be coal washing equipment, was it not?

A. That is correct.

Mr. Crosby: I would like to offer Defendant's A-1 in evidence.

Mr. Shapro: To which offer, your Honor, we object upon the ground that no proper foundation is laid.

The Court: The objection is sustained in [21] view of the statement that he didn't think it referred to the property which is mentioned in Plaintiff's Exhibits 1 and 2. That is what I understood him to mean to say.

(Defendant's Exhibit No. A-1 for identification was refused.)

Q. (By Mr. Crosby): During January and the first part of February, 1952, Mr. Huckaba, weren't you trying to sell coal washing equipment to be installed in the Bellingham Coal Mine?

A. That was one of my duties, yes, sir.

Q. And weren't you advised by Mr. McMillan that he would have to obtain authority from the Bellingham Coal Mine Company for the ordering of any equipment?

Mr. Shapro: I object to that on the grounds it has already been asked and answered.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

(Testimony of J. Stanley Huckaba.)

The Court: The objection is overruled.

A. I do not recall.

Q. (By Mr. Crosby): There was only one type of equipment that you were trying to sell to be placed in the Bellingham Coal Mine, isn't that correct? There may have been different sizes but there was only one type of equipment and the equipment was to have only one [22] purpose, isn't that correct?

A. That's correct, I believe, referring specifically to the coal washing plant, yes.

Q. Yes. So that this sales report of January 23, 1952, pertained to the same type of equipment or the type of equipment which you were trying to sell for installation in the Bellingham Coal Mine, isn't that correct?

Mr. Shapro: I object to that question, your Honor, upon the ground it has been asked and answered. The witness has already said no.

The Court: The objection is overruled.

The Witness: Read the question again, will you, please?

The Court: That will be done.

(The reporter read the last question.)

A. It pertains to the same type of equipment, yes.

Mr. Crosby: I now offer Defendant's Exhibit A-1 in evidence, as the witness has stated——

The Court: I heard his testimony.

Mr. Shapro: Your Honor, I object to the in-

(Testimony of J. Stanley Huckaba.)

troduction of Exhibit A-1 in evidence upon the ground that no proper foundation laid, that it is incompetent, irrelevant and immaterial, and that the document is merged, this being a contract dated February 20th, this [23] document being dated January 23rd, it is immaterial to the issue because it is merged in the written instrument which is dated subsequently to it.

The Court: Is there any other objection you have, such as not the specific property that was intended to be sold?

Mr. Shapro: Oh, yes, that is the basis of my saying that it is incompetent, irrelevant and immaterial, your Honor.

The Court: I wish you would be more particular. I don't think you should rely upon that phrase. We do not do that. I do not think that is a very highly respected phrase in Seattle, it is too broad.

Mr. Shapro: Your Honor, I will be very glad to accommodate myself to your Honor's suggestion, but I do want to make my objection.

The Court: What do you have in mind?

Mr. Shapro: I have two grounds of objection. First, the witness' testimony that this is of the same general type, taken in conjunction with his previous testimony that it is not the same size equipment or is not the same equipment as is described in Plaintiff's Exhibits Nos. 1 and 2, lays no proper foundation for the introduction of Exhibit A-1 in evidence by the defendant. Furthermore, since it represents, as he has [24] testified,

(Testimony of J. Stanley Huckaba.)

a part of his report of negotiations leading up to the document which has been admitted as Plaintiff's Exhibit 1 and also the confirmation, Plaintiff's Exhibit No. 2, and was dated and executed prior to that date, it must as a matter of law be deemed as negotiations merged in the subsequent contract and as such is not admissible.

The Court: The objection is sustained. Proceed. I do not wish to delay the proceedings. Go right ahead.

The Clerk: Defendant's Exhibit No. A-2.

(A two-page sales report, dated February 16, 1952, was marked Defendant's Exhibit No. A-2 for identification.)

The Court: I wish you to expedite the questioning. It is dragging, according to my feeling about it.

Q. (By Mr. Crosby): Mr. Huckaba, referring again to Defendant's A-1, isn't it true that you wrote a note on A-1 which pertained to Mr. McMillan's authority in connection with the ordering of machinery to be placed in the Bellingham Coal Mine Company?

Mr. Shapro: Your Honor, I object to that question upon the ground the document has been refused admission in evidence and therefore its contents is not [25] the proper subject of the question.

The Court: Read the question.

(The reporter read the last question as follows:

(Testimony of J. Stanley Huckaba.)

> ("Q. Mr. Huckaba, referring again to Defendant's A-1, isn't it true that you wrote a note on A-1 which pertained to Mr. McMillan's authority in connection with the ordering of machinery to be placed in the Bellingham Coal Mine Company?")

The Court: That objection is overruled. Look at the document, if you wish to look at it, A-1. Is that the one you refer to?

Mr. Crosby: Yes, that's the one.

The Court: Did you refer to A-1?

Mr. Crosby: Yes, I did, your Honor.

The Court: Let the witness see it. Read the question, Mr. Reporter.

> (Defendant's Exhibit No. A-1 was handed to the witness. The reporter reread the last question.)

A. That's correct.

Q. (By Mr. Crosby): Isn't it true that that note pertained [26] to his general authority even up through your preparation of Plaintiff's Exhibit No. 1?

Mr. Shapro: To that question, your Honor, we object upon the ground it calls for the opinion and conclusion of the witness.

The Court: The objection is sustained, and I think you better call a witness as a part of the defendant's case in chief. I do not think the Court over objection will permit any further cross ques-

(Testimony of J. Stanley Huckaba.)

The Court: I presume the question is still addressed to Exhibit A-2?

Mr. Crosby: Yes.

The Court: I see that Counsel have not conducted a pretrial procedure. We will just excuse everybody here and have a pretrial procedure. We are just wasting time here and I don't approve of it at all. How many more exhibits are you going to show this witness that he hasn't seen until today?

The Witness: Not for a number of years, I [29] haven't, your Honor, I haven't seen——

The Court: Mr. Crosby, how many more exhibits do you have here that you are going to fool away a lot of time on?

Mr. Crosby: I have one more, your Honor.

The Court: Is that all, one more?

Mr. Crosby: Yes, in addition to—so that there will be three in all.

The Court: You already have A-1, A-2 and A-3 marked. Are those the ones?

Mr. Crosby: Those are the ones, your Honor.

The Court: And there is no other that you are going to deal with in respect to this witness' cross-examination, is that right?

Mr. Crosby: That's right, your Honor.

The Court: All right, you may proceed and finish, but do so expeditiously.

Mr. Crosby: If it would expedite matters, your Honor, I would——

The Court: We are going to have a pretrial proceedings in this case but we are going to finish

(Testimony of J. Stanley Huckaba.)

with this witness. I want to finish with this witness and these exhibits now. Proceed.

Q. (By Mr. Crosby): Mr. Huckaba, referring now to both Defendant's Exhibits A-2 and A-3, isn't it true that [30] A-3 is the same as A-1 and A-2, that they were prepared by you, sales reports to be submitted to your San Francisco office?

A. Correct.

Q. And signed by you? A. Yes, sir.

Q. And isn't it true that there are notations on A-2 and on A-3 pertaining to sale of equipment to be placed in the Bellingham Coal Mine?

A. They were relative to the sale, A-2 and A-3, but I see no reference to equipment.

Q. They are relative to the sale?

A. Relative to the pending sale, yes.

Q. That's right, which culminated in your preparing Defendant's Exhibit No. 1, which is a quotation——

Mr. Shapro: Plaintiff's.

Q. (By Mr. Crosby): Or Plaintiff's Exhibit No. 1, which is a quotation? A. Correct.

Q. Isn't it true that there are notes on those exhibits which indicate that the Bellingham Coal Mine Company had to approve the purchase of the equipment which was to be placed in the Bellingham Coal Mine?

Mr. Shapro: I object to that question, your Honor, upon the ground it calls for the opinion and [31] conclusion of the witness.

The Court: Read the question.

(Testimony of J. Stanley Huckaba.)

(The reporter began reading the last question as follows:

("Q. Isn't it true that there are notes on those exhibits which indicate that the Bellingham Coal Mine Company * * *")

The Court: The objection is sustained. Ask him whether or not there are any notes on there without his interpreting them.

Q. (By Mr. Crosby): Did you place any notes on Defendant's Exhibits A-2 and A-3 which pertain to the Bellingham Coal Mine Company considering passing upon the purchase of equipment which you were endeavoring to sell through Mr. McMillan?

Mr. Shapro: I object to that question on the ground that it calls for the opinion and conclusion of the witness.

The Court: The objection is sustained. You may ask him if he wrote any note on there. The note speaks for itself, if he wrote one on there, as to what it means, and so forth.

Q. (By Mr. Crosby): All of the writing on these exhibits, A-1 and A-2, were placed there by you, isn't that true? [32]

A. No, sir. There's considerable writing on here that's not mine.

Q. Pardon me. Except for the stamp up in the upper right-hand corner, the rest of the form was prepared by you?

A. Well, there are various notes made on here by the San Francisco office as to where it should

(Testimony of J. Stanley Huckaba.)
go to and so forth, but essentially all of it's my writing, yes, that's right.

Q. All right.

Mr. Crosby: I would like to offer in evidence Exhibits A-1 and A-2.

Mr. Shapro: To which offer, your Honor, we object upon the ground that no proper foundation has been laid, and upon the further ground that by the answer of the witness to the question propounded by Counsel that the notes, A-1 and A-2, the reports culminated in the sale which is recorded in Plaintiff's Exhibits 1 and 2, we have the same ground, namely, that it was merged in the written instrument of a later date and, therefore, it would be a violation of the parol evidence rule to admit it.

The Court: The objection is sustained. The Court believes Counsel should prove his own case by his own witnesses in his own way. There is another reason [33] why the Court makes this ruling at this time. I do not think Counsel has established admissibility.

Q. (By Mr. Crosby): Mr. Huckaba, you made several trips, did you not, to Bellingham and visited the Bellingham Coal Mine Company?

A. Yes, sir.

Q. And isn't it true that you understood that the equipment shown on your quotation sheet, which is Plaintiff's Exhibit No. 1, you understood that the equipment was to be placed in the Bellingham Coal Mine that you visited?

(Testimony of J. Stanley Huckaba.)

A. That's correct.

Q. Approximately how many trips did you make to the Bellingham Coal Mine?

A. At least ten during the course of the sale and the installation of the equipment and placing the equipment in operation, ten or more.

Q. Were you ever told by Mr. McMillan that the Northwestern Improvement Company was to pay for the equipment shown on Plaintiff's Exhibit 1?

Mr. Shapro: Your Honor, we object to that question upon the ground that it calls for hearsay, is a violation of the parol evidence rule, it is an attempt to vary the terms of a written instrument by parol. The order and the acceptance and the confirmation [34] are all with Northwestern Improvement Company and call for payment by them.

The Court: What have you to say on that, Mr. Crosby?

Mr. Crosby: Your Honor, the plaintiffs here have introduced Exhibits 1 and 2 showing or purporting to show that certain equipment was ordered by the Northwestern Improvement Company, and this witness stated that the equipment was sold to the Northwestern Improvement Company, and I have asked this witness if he was ever told by Mr. McMillan, with whom he was dealing, that the Northwestern Improvement Company intended to pay for this equipment.

The Court: The objection is sustained, on the ground that if Mr. McMillan intended that he

(Testimony of J. Stanley Huckaba.)

should have written that name in there instead of what he did write.

Q. (By Mr. Crosby): Did you ever discuss terms of payment with Mr. McMillan?

Mr. Shapro: The same objection, if your Honor please. It's all merged in the written order.

The Court: The objection is sustained. Mr. Crosby, if you fix the time and if it happened that these men did something or that their conduct was in some way amendatory of the contract or if later than [35] the date of the contract these men made some agreement, you can show that, but so far as these preliminary negotiations that merged into this contract are concerned, whenever the objection is on that ground and if it truly applies, that objection does, to the circumstances, the Court will sustain it. You needn't take up your time or the Court's time. Just make an offer of proof and let the Court pass upon it now and make your record, if you want to do so, and let's not waste all this time.

Mr. Crosby: I have no further questions, and I would like to pass for the moment the offering of Defendant's A-2 and A-3.

The Court: Very well.

Mr. Shapro: We have no redirect, your Honor.

The Court: The witness may step down.

(Witness excused.)

The Court: Now, before we proceed further, we are now going to have an interruption of this trial

on the merits to proceed with a pretrial proceeding. I wish the plaintiff to bring out every exhibit, everything in the way of physical evidence which he intends to offer or which he may possibly offer, and exhibit it to opposing Counsel to see what his attitude is about your using it as evidence in this case and so he [36] will know what it is, and then after you have done that I wish your opponent to do the very same thing. I wish him to bring out every piece of paper, every physical thing that he intends to offer as an exhibit and display it to opposing Counsel and advise him of what he intends to do with it, and then if there is any question about any of it I wish to have it marked tentatively with the clerk's identifying mark.

Mr. Shapro: I understand, your Honor. I just want your Honor to know what I'm sure Mr. Crosby does, too. I have previously exchanged copies of the documents. What we haven't done heretofore is to advise each other those of the documents which we propose to offer in evidence.

The Court: Then will you proceed to do that now?

Mr. Shapro: Yes, your Honor.

The Court: Each of you.

Mr. Shapro: Yes, your Honor.

The Court: Court will be at recess subject to call.

Mr. Koch: Your Honor, may Mr. Huckaba be excused?

The Court: Do you wish to call him as your witness? [37]

Mr. Crosby: Yes, I do, your Honor.

The Court: Then he will not be excused.

Mr. Crosby: Your Honor, at this time I would like to file a memorandum of authorities which has previously been served upon opposing Counsel.

The Court: I wish both sides to know the Court will welcome any trial memorandum that they may see fit to file. Court is now at recess subject to call.

(Short recess.)

The Court: Do you think it will take substantially a half hour, as I have been informed?

Mr. Shapro: Yes, your Honor. It is a laborious task, unfortunately.

The Court: In that case the court will be at recess as far as the trial proceedings are concerned until tomorrow morning at 10:00 o'clock, and Counsel may remain here and I wish you would remain here for the time that you need and attend to these matters.

Mr. Shapro: We will do so, your Honor. Thank you.

(Thereupon, at 3:25 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Thursday, June 14, 1956.) [38]

Thursday, June 14, 1956—10:25 o'Clock A.M.

(All parties present as before.)

The Court: You may now proceed if you are ready.

Mr. Shapro: Your Honor, pursuant to your

Honor's suggestion of yesterday, Mr. Crosby and I have exchanged documents for inspection, such documents as each of us feel may be offered in evidence during the course of this trial. I say may be, your Honor, because both in his case and in mine the offering of certain of these documents will depend upon how much of the other's evidence is received. In other words, say for argument, your Honor, on our case there were only two documents that we proposed to offer, whereas we have about sixteen that we may have to offer, depending upon how much evidence in the defense or on cross-examination of plaintiff's witnesses may be received by the Court.

What we have done, which we hope will meet with your Honor's approval, is, we have advised each other which of the other's documents we will not object to when they are offered, and we have also advised each other of the grounds upon which we will object to those of the others when and if they are offered. We have [39] read each other's documents—in other words, there won't be any delay in connection with that, we are familiar with each other's documents, and since some of the documents we wanted were in Counsel's possession and in turn the reverse, we have them all available now for each other. There are not many documents, your Honor, that we have suggested that the plaintiff might offer that Counsel for the defendant has indicated he has no objection to and there are not very many of his that we have indicated no objection to either. So I think that if your Honor would

prefer we can—we have them grouped now, we can offer them for marking for identification or we can do likewise as they arise, whichever your Honor prefers.

The Court: It doesn't matter with me. I think probably you might treat them more logically if they are handled, in view of the fact that we have delayed this long for the pretrial procedure, if they are handled in the order in which you think they will properly come up, if that is agreeable with you, Mr. Shapro.

Mr. Shapro: That is perfectly satisfactory, your Honor.

Mr. Crosby: That is satisfactory, your Honor.

The Court: Very well. [40]

Mr. Shapro: Thank you, your Honor. Then the plaintiff will call at this time Mr. E. J. Barshell.

The Court: Come forward and be sworn as a witness, Mr. Barshell.

EDWIN J. BARSHELL

called as a witness in behalf of plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Shapro:

Q. Mr. Barshell, your full name, please?

A. Edwin J. Barshell.

Q. And you reside where, Mr. Barshell?

A. In Burlingame, California.

Q. And at the present time you are an officer of

(Testimony of Edwin J. Barshell.)

Western Machinery Company, the plaintiff in this case? A. I am.

Q. And what is your office?

A. I am the Secretary-Controller of Western Machinery Company.

Q. Are the records of the company with respect to among other things sales, purchases, accounts and collections kept under your supervision?

A. They are.

The Clerk: Plaintiff's Exhibit No. 3. [41]

(Six invoices of Western Machinery Company were marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Shapro): Mr. Barshell, you have been handed Plaintiff's Exhibit No. 3, which consists of what purport to be six invoices on the invoice head of Western Machinery Company. Do you recognize those documents? A. I do.

Q. Of your own knowledge, what are they?

A. They are copies of the invoices issued by Western Machinery Company to the Northwestern Improvement Company.

Mr. Shapro: Would the bailiff show the witness Plaintiff's Exhibits Nos. 1 and 2, please?

(The bailiff did as requested.)

Q. (By Mr. Shapro): Mr. Barshell, will you examine Plaintiff's Exhibits Nos. 1 and 2 and then tell the Court if you can, of your own knowledge, whether or not the six invoices comprising Plain-

(Testimony of Edwin J. Barshell.)
tiff's Exhibit 3 represent billings for the equipment described in Exhibits 1 and 2?

A. They represent the billings for the equipment represented in Exhibits 1 and 2.

The Clerk: Plaintiff's Exhibit No. 4.

> (An invoice of Western [42] Machinery Company was marked Plaintiff's Exhibit No. 4 for identification.)

Mr. Shapro: At this time, your Honor, we offer in evidence on behalf of plaintiff the documents marked Plaintiff's Exhibit No. 3.

Mr. Crosby: I object to the admissibility at this time until I have an opportunity to cross-examine the witness in connection with it, as I feel that the exhibits cover additional items over and above those shown in Plaintiff's Exhibits 1 and 2.

The Court: Do you wish them disregarded as to those additional items, if any?

Mr. Shapro: If any—well, your Honor——

The Court: Give the witness an opportunity to say——

Mr. Shapro: This is another document now, your Honor.

The Court: I wish to deal with this other one first. We will go back to that, Plaintiff's Exhibit No. 3. Invite his attention to that subject.

Mr. Shapro: As far as the——

The Court: If it is based on fact, Mr. Shapro, this objection is well taken; only, however, if it is

(Testimony of Edwin J. Barshell.)

based upon actual fact that it refers to matters other than what has been mentioned. [43]

Mr. Shapro: Well, may I develop that then, your Honor? In other words, I will withdraw the offer at the moment of Exhibit No. 3.

The Court: You may proceed.

Q. (By Mr. Shapro): Mr. Barshell, referring your attention to Plaintiff's Exhibit No. 3, what items of equipment, if any, are included therein that are not specified in Exhibits 1 and 2?

A. Mr. Shapro, in checking this we find that there were included some additional items which were billed or invoiced by Exhibit No. 3 which were not originally specified in Exhibits Nos. 1 and 2.

Q. Do you know what those items are?

A. They consisted of two additional spirals, coal dewatering devices.

Q. And do you know the amount included in the billings of Plaintiff's Exhibit No. 3 for the additional items that you have just described?

A. I would assume, and I'm——

Mr. Crosby: I object to the answer.

The Court: Answer only if you know. If you know that answer, you may state it. If you don't, do not do so.

A. It is the difference between the invoiced amount——

Mr. Crosby: I object to this answer as the [44] witness said that he assumed.

(Testimony of Edwin J. Barshell.)

The Court: The objection is overruled. He may make the statement that he has now begun.

A. It is the difference between the total amount of the order reflected in Invoice No. 377——

The Court: I don't know what that is.

A. I beg your pardon. Exhibit No. 3.

Q. (By Mr. Shapro): There are six invoices that are a part of Exhibit No. 3, is that right?

A. That is right.

Q. Your last statement, Mr. Barshell, was directed to one of those six invoices?

A. They show the total—on the final—on Billing No. 6 it shows the total amount of the order.

Q. As what amount?

A. As $68,074, which does not include freight or sales taxes.

Q. All right. Now take a look at Plaintiff's Exhibit No. 2. What is the amount of that without freight or sales taxes? A. $63,680.

Q. If you know, what is represented by the difference between the $68,074 figure and the $63,680 figure?

A. The additional equipment mentioned by me before.

Mr. Shapro: We now renew the offer in [45] evidence of Plaintiff's Exhibit No. 3.

The Court: I don't understand for what purpose you offer the exhibit with respect to those objected to items.

Mr. Shapro: They are the total of those invoices, which is——

(Testimony of Edwin J. Barshell.)

The Court: Do you seek recovery in respect to those additional items?

Mr. Shapro: Yes, your Honor, certainly. They are in the complaint. They are part of the complaint.

The Court: Any further objection?

Mr. Crosby: Yes, I still object to the invoices in respect to the additions over and above the amounts shown by Plaintiff's Exhibits 1 and 2 since there has been no testimony here to the effect that any additional items were ordered by either Bellingham Coal Mine or N. W. I. nor delivered to them.

Mr. Shapro: Your Honor, such is not the fact. The Witness, Huckaba, yesterday testified on cross-examination as to these same spirals, the additional ordering and the additional delivery.

The Court: The objections are overruled. Plaintiff's Exhibit 3 is now admitted.

(Plaintiff's Exhibit No. 3 for identification was admitted in evidence.) [46]

Q. (By Mr. Shapro): Mr. Barshell, will you examine Plaintiff's Exhibit 4, please, and tell the Court whether or not of your own knowledge you know what that document is?

A. This is a statement rendered after the final shipment of all items covered by Exhibit No. 3 to Northwestern Improvement Company indicating the total amount due.

Q. And what is that total amount?

(Testimony of Edwin J. Barshell.)

A. $71,038.71.

Mr. Shapro: Mr. Crosby, will you stipulate that the rubber stamp appearing on the face of Exhibit No. 4 saying, "Approved, Manager of Coal Operations," and the signature thereon of Earl R. McMillan, are the genuine rubber stamp and signature of the Northwestern Improvement Company?

Mr. Crosby: I will stipulate to that, but not to the admissibility of the exhibit.

Mr. Shapro: I didn't ask you to stipulate to the admissibility of it. Now, there is also on Exhibit 4, Mr. Crosby, a blue stamp indicating the receipt of that by the manager of the Northwestern Improvement Company. Will you stipulate that that is the authentic stamp of the Northwestern Improvement Company?

Mr. Crosby: Yes, I will. [47]

Mr. Shapro: At this time, your Honor, we offer in evidence Plaintiff's Exhibit No. 4. It represents as an admission against interest, signed by the defendant, received by the defendant and approved in writing by its manager of coal operations of the exact amount of the original demand in plaintiff's complaint.

Mr. Crosby: Your Honor, I would like to make the same objection to this exhibit that I made to Exhibit No. 3, in that this includes additional items besides those shown in Plaintiff's Exhibits 1 and 2, and as for any amount in addition to $63,680 I feel that any order there was not covered by those original quotations and letter and were not within

(Testimony of Edwin J. Barshell.)

the scope of Mr. Huckaba's original testimony, and there was no proof of ordering or delivery by the Northwestern Improvement Company.

The Court: I have not retained in my mind what, if anything, was said by this witness regarding the company management or the business identification of the person signing this approval stamp, Carl or——

Mr. Shapro: Earl R. McMillan. We stipulated, your Honor, that he was the manager of coal operations of the defendant Northwestern Improvement Company to whom the statement was addressed. [48]

The Court: Is there anything in the evidence as to in what capacity he signed this approval?

Mr. Shapro: The document, your Honor, we submit, speaks for itself. He signed it as manager of coal operations.

The Court: There isn't anything on that stamp as to whose coal operations he was manager of.

Mr. Shapro: Well, it is stipulated that Mr. McMillan was on August the 15th, 1952, the manager of coal operations of Northwestern Improvement Company.

Mr. Crosby: But in his approval on there he——

The Court: Is it or is it not so stipulated?

Mr. Crosby: It is not stipulated that his signature on there was as manager of——

The Court: Then it hasn't been stipulated yet. You needn't say what is not. Did you hear what

(Testimony of Edwin J. Barshell.)

Counsel asked you? And I would like you to say yes or no.

Mr. Shapro: Shall I repeat it, your Honor?

The Court: Yes.

Mr. Shapro: I say, will you stipulate, Mr. Crosby, that on August 15, 1952, which is the date of the receipt by Northwestern Improvement Company in its office of the item marked Plaintiff's Exhibit No. 4, that Earl R. McMillan was the manager of coal operations [49] of Northwestern Improvement Company?

Mr. Crosby: I will stipulate to that, yes.

The Court: Now, did you wish to state a further objection or further clarification?

Mr. Crosby: I wish to further object in that it is not shown that this approval was as manager of coal operations of Northwestern Improvement Company, as the testimony has also shown that Northwestern Improvement Company was managing the Bellingham Coal Mine Company to which this equipment was delivered.

Mr. Shapro: May I respond, your Honor?

The Court: Yes.

Mr. Shapro: The invoice is addressed to Northwestern Improvement Company, the statement is addressed—it is marked "Approved, Manager of Coal Operations," without reservation. Counsel has just stipulated that the man who approved it was the manager of the coal operations of Northwestern Improvement Company.

(Testimony of Edwin J. Barshell.)

The Court: The objections are overruled. Plaintiff's Exhibit 4 is admitted.

(Plaintiff's Exhibit No. 4 for identification was admitted in evidence.)

Mr. Shapro: I have no further questions of this witness, your Honor. [50]

The Court: You may cross-examine.

Cross-Examination

By Mr. Crosby:

Q. Mr. Barshell, would you please refer to Plaintiff's Exhibit No. 1, which is the quotation, and also referring to Plaintiff's Exhibit No. 3, do you find that the Riplflow vibrating screens are the same, the invoice which is Exhibit No. 3 cover the same Riplflow vibrating screens as are shown on Exhibit No. 1?

A. Mr. Crosby, Exhibit No. 3 indicates only the billing for a unit described as a 3C Mobil Mill.

Q. You, yourself, do not know whether Invoice No. 3 covers equipment that has the same Riplflow vibrating screens as are shown in Plaintiff's Exhibit No. 1, do you? A. I do not.

Q. It could have been changed and you wouldn't be aware of it? A. Yes, sir.

Q. Isn't that correct? A. That is right.

Q. So that as far as you're concerned Exhibit No. 3 is merely a piece of paper which is under your custody, you had nothing to do with the prepa-

(Testimony of Edwin J. Barshell.)

ration of it nor do you know exactly what it [51] covers?

A. I know it covers a shipment to the Northwestern Improvement Company.

Q. Yes, but you don't know what the exact equipment was that was shipped, do you?

A. The exact equipment?

Q. Yes. You don't know what exact equipment was shipped to Bellingham Coal Mine? You don't know whether it's the same or different equipment than that shown on Exhibit No. 1?

A. Mr. Crosby, I might assume that this Exhibit No. 1 or No. 2 have an order number written on. This invoice indicates the same order number.

Mr. Crosby: I wish that the answer be stricken.

The Court: The answer is stricken. Answer responsively.

A. Yes, your Honor.

The Court: I believe he is calling for your personal knowledge.

A. My personal knowledge, no, Mr. Crosby, I do not know.

Mr. Crosby: I would like to have these marked.

The Clerk: Do you want them marked together, Mr. Crosby?

Mr. Crosby: It is satisfactory to have those [52] marked as one exhibit.

The Court: Is there any objection?

Mr. Shapro: No objection to that method of marking, your Honor.

The Clerk: Defendant's Exhibit No. A-4.

(Testimony of Edwin J. Barshell.)

(Seven cancelled checks were marked Defendant's Exhibit No. A-4 for identification.)

The Clerk: Defendant's Exhibit No. A-5.

(Copy of letter dated 15 August, 1952, from Bellingham Coal Mines Co. to Western Machinery Co. was marked Defendant's Exhibit No. A-5 for identification.)

The Court: May I suggest, Mr. Crosby, that you are doing the very same thing you did yesterday as it appears on the face of the thing. For instance, at this moment I do not recall anything that this witness said that makes these documents come within the scope of the direct examination. They look like things which you should prove by your own witnesses as a part of the defendant's case in chief. That is the way they look. However, if you can show that they connect some integral part with or have some connection with his testimony on direct, you may proceed. I just want to remind you it looks to me like you are starting right off on the same tack you did yesterday afternoon, [53] wasting a lot of your time and everybody's time here out of order. You may proceed, though.

Mr. Crosby: Well, your Honor, this man has introduced certain invoices. I think it is proper to show payment that they received on these invoices.

Mr. Shapro: Your Honor, only to the extent, I mean as long as Your Honor has brought up the subject, we do not believe that it is material for

(Testimony of Edwin J. Barshell.)

the defense to show payment unless and except to the extent, if they have any, that they purport to show payment in excess of the $22,089.76, which we admit in our complaint. Other than that there is no materiality to it so far as cross-examination is concerned.

The Court: The objection is overruled. You may proceed.

Q. (By Mr. Crosby): Mr. Barshell, would you please refer to Defendant's Exhibits Nos. A-4 and A-5——

The Court: Now, ask him another question. He is looking at them.

Mr. Crosby: I might save some time if Counsel wishes to stipulate that these were received by the plaintiff in payment of the invoices which are shown by Plaintiff's Exhibits 3 and 4.

Mr. Shapro: I will stipulate that Defendant's Exhibit A-5, the letter, the original of it was [54] received by us. I stipulate that we received, "we," meaning the plaintiff, received the checks comprising Defendant's Exhibit A-4. However, to the extent that the aggregate, which I am taking Mr. Crosby's statement for, of those checks is $752.03 in excess of the amount specified in our complaint as a credit against the account, we do not so stipulate that they applied on this account.

The Court: But they were received on account now here in suit?

Mr. Shapro: No, your Honor. They were all re-

ceived on this account with the exception of an amount of $752.03.

The Court: They were as to some part of the total amount received in part payment on this account?

Mr. Shapro: No, your Honor, I can't agree to that. I'm sorry, sir, because——

The Court: Then I misunderstand you.

Mr. Shapro: There were other accounts involved.

The Court: Was any part of them received by the plaintiff on this account for the alleged sale to the defendant in this case?

Mr. Shapro: Yes, your Honor, an aggregate of $22,089.76. [55]

The Court: Which exhibit is that?

Mr. Crosby: That is A-4.

The Court: Do you offer that?

Mr. Crosby: I now offer it.

The Court: The objection is overruled. Defendant's Exhibit A-4 is admitted.

(Defendant's Exhibit No. A-4 for identification was admitted in evidence.)

Mr. Crosby: I offer Defendant's Exhibit A-5, which is a letter enclosing a check for $15,000, which I'm sure Counsel will stipulate was paid on this account.

Mr. Shapro: No objection.

The Court: Admitted.

(Testimony of Edwin J. Barshell.)

(Defendant's Exhibit No. A-5 for identification was admitted in evidence.)

Mr. Crosby: I have no further questions.

The Court: You may inquire.

Mr. Shapro: Yes, I would like to.

The Court: You may do so.

## Redirect Examination

By Mr. Shapro:

Q. Mr. Barshell, will you examine Defendant's Exhibit A-4 and tell the Court whether or not from looking at those checks you can tell if they all were received and [56] applied by your company in partial payment of the item covered by the $71,000 charge?

A. I can state that—now, will you repeat that question, please?

The Court: Mr. Reporter, will you kindly do so?

(The reporter read the last question.)

A. They were not all received by us and applied in partial payment.

Q. (By Mr. Shapro): Can you tell the Court which of those checks or what portion of any of those checks was not received and applied by you in partial payment of that account?

A. Check No. 743 for $28.14, Check No. 929 for $204.84——

Mr. Crosby: I'm sorry, I didn't get that last amount.

(Testimony of Edwin J. Barshell.)

Mr. Shapro: $204.84.

A. In fact, Mr. Shapro, Check No. 929 never came into our hands at all. The proceeds did, but this didn't.

Q. (By Mr. Shapro): Well, the proceeds came into your hands? A. That's right.

Q. That's all that is necessary.

The Court: Were they applied to this account?

A. No, sir, the proceeds of this were not [57] applied to this particular account.

Q. (By Mr. Shapro): What is the amount of that? A. $204.84.

Q. That's a repetition of the same amount?

A. I can't hear you, sir.

The Court: No, he is restating what he has already stated, in my opinion.

Mr. Shapro: Oh, I see.

Q. (By Mr. Shapro): Mr. Barshell, so there will be no confusion in the record, you have referred to an item of $28.14——

A. That's Check No. 743, dated June the 30th.

Q. And you have referred to an item of $204.84.

A. That's Check No. 929, dated October the 9th, 1953.

Q. Are there any other of those checks that you can testify were not received and applied by your company on account of the obligation sued hereupon?

A. Mr. Shapro, I do not know about all of them. I mean those two I know definitely did not apply.

Q. Do you know, Mr. Barshell, whether or not

(Testimony of Edwin J. Barshell.)

any of the items covered by those checks included interest upon any portion of this obligation as distinguished from the principal thereof?

A. I know of my own knowledge that it did.

Q. That it did? [58] A. It did.

Q. Can you tell how much of the aggregate of those checks other than the $15,000 check included such interest?

A. I cannot tell by inspection of the checks.

Q. To the extent, Mr. Barshell, that the aggregate of the checks comprising Defendant's Exhibit A-4 exceeds the sum of $22,089.76, which difference is $752.03, can you tell the Court of your own knowledge what that represents?

A. That represented interest.

The Court: Which one is that, which one?

A. The difference, your Honor, between the value of these checks in the aggregate and the amount of $22,089.04, I believe.

The Court: Where is that shown, on which one of the exhibits?

Mr. Shapro: It's only the aggregate, the total, your Honor.

The Witness: It's only the aggregate total, your Honor.

The Court: Is that made up by you orally at this time or is it something shown on one of the exhibits?

A. It's not on these exhibits, your Honor.

Mr. Shapro: I have no further questions. [59]

(Testimony of Edwin J. Barshell.)

The Court: Any further cross-examination?

Mr. Crosby: Yes, your Honor.

Recross-Examination

By Mr. Crosby:

Q. Mr. Barshell, you're just guessing, aren't you, when you say that the difference represents interest? You personally don't know?

The Court: Just ask him one question at a time.

Q. (By Mr. Crosby): You're just guessing when you say the difference represents interest?

A. Mr. Crosby——

The Witness: May I ask a question, your Honor?

The Court: No, you answer.

A. I'm sorry. Am I guessing?

Q. (By Mr. Crosby): Yes.

A. No, I am not guessing.

Q. Well, this was an open account, wasn't it? Why should you charge interest on an open account?

Mr. Shapro: I object to that, if your Honor please, on the ground it is argumentative and calls for the opinion and conclusion of the witness.

The Court: Objection sustained. He hasn't [60] said it was an open account. That is the fault with Counsel's form of interrogation. You have asked two questions before you let the witness answer.

Mr. Crosby: I'm sorry, your Honor. I will withdraw the questions.

(Testimony of Edwin J. Barshell.)

Q. (By Mr. Crosby): The billings shown by Plaintiff's Exhibits 3 and 4 are for an open account, aren't they? A. They are.

Q. Did the Western Machinery Company have any agreement to charge interest on that open account? A. They did not.

Q. So then if there was any interest from those payments charged, if there was any portions of those checks shown by Defendant's A-4 applied toward interest, then it was applied improperly?

Mr. Shapro: I object to that, if your Honor please, on the ground it calls for the opinion and conclusion of the witness.

The Court: The objection is overruled. Be sure to make your statements in the form of clear questions and not just make statements where you have to see a question mark to know it is a question, because the reporter might not get down the question mark.

Mr. Crosby: I'm sorry, your Honor. I will endeavor to do that. [61]

Q. (By Mr. Crosby): Mr. Barshell, would you perfer that I restate the question?

A. Oh. Will you restate the question, please?

Q. Isn't it true that Western Machinery Company should not have applied any of the payments toward invoices shown by Plaintiff's Exhibits 3 and 4 toward interest?

Mr. Shapro: I object, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

(Testimony of Edwin J. Barshell.)

The Court: The objection is overruled. This witness is in an accounting capacity largely. You may answer.

A. The interest reflected by these checks was applied to a note of Bellingham Coal Company.

Q. (By Mr. Crosby): I would like to again ask you, Mr. Barshell, isn't it true that as far as any account of Northwestern Improvement Company the Western Machinery Company should not have charged any interest?

A. That is right.

The Clerk: Defendant's Exhibit No. A-6.

(A promissory note dated August 20, 1952, from Bellingham Coal Mines Co., to Western Machinery Co., was marked Defendant's Exhibit No. A-6 for identification.)

Mr. Crosby: Your Honor, in view of what [62] has been developed on——

The Court: At this time we will take about a ten minute recess. Those connected with this case will be excused. I wish to take up something else that does not concern this case.

(Short recess.)

The Court: All are present. You may proceed.

EDWIN J. BARSHELL

resumed the stand:

Mr. Shapro: Your Honor, may I ask your Honor's indulgence for a moment? I think it will

(Testimony of Edwin J. Barshell.)
help clarify the situation as a result of what I have done during the recess. Will your Honor permit me to take up with Mr. Barshell on redirect before Counsel completes this recross the subject matter of those checks that are part of Exhibit A-4?

The Court: Yes.

Mr. Shapro: I think it will help to clarify what otherwise might be a muddy situation.

The Court: You may proceed.

Redirect Examination

By Mr. Shapro:

Q. Mr. Barshell, will you look at the checks comprising Defendant's Exhibit A-4 and tell me whether or not you have with you records here which will indicate the [63] appplication of three of those checks to other than the Mobil Mill?

Mr. Crosby: I object to that as a leading question.

The Court: Sustained.

Q. (By Mr. Shapro): Mr. Barshell, do you have any records here that have not been made available to you so far in court that can identify any of those checks?

Mr. Crosby: Well, I object to that question as being too broad.

The Court: The objection is overruled.

A. We have.

Q. (By Mr. Shapro): And what is it?

A. It constitutes the open account of the Bellingham Coal Company.

The Court: What does that constitute?

A. That's the ledger account of the open account of the Bellingham Coal Company.

The Court: It has not been marked yet.

Mr. Shapro: I haven't handed it up yet.

The Court: You should have anything that a witness speaks of in his testimony already identified in some way by the clerk with a mark so that there is always connection without any argument about what the witness was speaking of. [64]

The Clerk: Defendant's Exhibits A-7, A-8 and A-9.

(Western Machinery Co. accounts receivable ledger re Bellingham Coal Mines, was marked Defendant's Exhibit No. A-7 for identification.)

(Western Machinery Co. accounts receivable ledger re Northwest Improvement Co., was marked Defendant's Exhibit No. A-8 for identification.)

(A letter dated August 23, 1952, from Herbert S. Little to E. J. Barshell, was marked Defendant's Exhibit No. A-9 for identification.)

The Clerk: This is Plaintiff's Exhibit No. 5.

(Western Machinery Co. accounts receivable ledger re Bellingham Coal Mines, was marked Plaintiff's Exhibit No. 5 for identification.)

The Court: I had not known that anybody had

(Testimony of Edwin J. Barshell.)

asked for any marking of any Defendant's Exhibits. When was that request made?

Mr. Crosby: Your Honor, before Counsel asked to go back to his redirect I had already handed to the clerk for marking three additional exhibits. I wasn't advised that Counsel wished to re-examine his witness.

Mr. Shapro: That is correct, your Honor. It's my fault. By asking that indulgence I have probably broken up the line of questioning. [65]

The Court: Do you wish the clerk to mark for identification Defendant's Exhibits A-7, A-8 and A-9, Mr. Crosby?

Mr. Crosby: Yes, I do, your Honor.

The Court: Do you, Mr. Shapro, wish the clerk to mark for identification Plaintiff's Exhibit 5?

Mr. Shapro: I do, your Honor. Might I ask that the record show that in the last answer of the witness referring to an open account of Bellingham Coal Mine Company, he was referring to what is now marked Plaintiff's Exhibit No. 5.

The Court: I ask the witness if that is true?

A. Yes, your Honor.

Q. (By Mr. Shapro): Mr. Barshell, with Plaintiff's Exhibit 5 in your hand and by comparing that with the checks comprising Defendant's Exhibit A-4, can you tell the Court now which if any of the checks comprising Defendant's Exhibit A-4 were received by Western Machinery Company for accounts other than the Mobil Mill account sued upon herein?

(Testimony of Edwin J. Barshell.)

A. Check No. 743 dated June the 30th in the sum of $28.14 was applied to the Bellingham Coal Mines' open account. Check No. 929 dated October the 9th, 1953, in the sum of $204.84 was applied to Bellingham Mines' open account. Check No. 1017 dated November 10, 1953, in [66] the sum of $1,612.67 was applied to Bellingham Mines' open account.

Mr. Shapro: At this time, your Honor, we offer——

The Court: Of what exhibit, if any, are those checks a part?

Mr. Shapro: They are a part of——

The Court: Just a minute.

Mr. Shapro: Oh, pardon me.

The Court: Mr. Barshell?

A. They are a part of Exhibit No. A-4, your Honor.

The Court: That is Defendant's Exhibit A-4?

A. That is right, your Honor.

The Court: Does Defendant's Exhibit A-4 contain any check or voucher indicating payment by Bellingham Coal Mines of any account other than those you have mentioned?

A. Yes, your Honor.

The Court: Did you say or did you not intend to say that that Defendant's Exhibit A-4 contains among other things checks or vouchers of the Bellingham Coal Mines paying on account of an open account which your company had direct with Bellingham Coal Mines?

(Testimony of Edwin J. Barshell.)

A. Yes. [67]

The Court: Different from the account which is connected with Plaintiff's Exhibits 1 and 2?

A. Yes, your Honor.

The Court: State how many checks there are of that Defendant's Exhibit A-4 that relate to the so-called open account of Bellingham Coal Mines.

A. Three of them, your Honor.

The Court: What are their numbers?

A. This is the open account, your Honor, of the Bellingham Coal Mine.

The Court: Wait a minute. Three checks numbered what?

A. 743, your Honor, for twenty-eight fourteen.

The Court: Twenty-eight what, dollars?

A. Dollars and fourteen cents. 929 for $204.84, and 1017 for $1,612.67.

The Court: Did you or did you not say that those three checks were sent for and received by the plaintiff in payment on the open account with Bellingham Coal Mines?

A. That is right, your Honor.

The Court: You may inquire.

Mr. Shapro: At this time, if your Honor please, we offer in evidence Plaintiff's Exhibit 5. [68]

Mr. Crosby: I object to the admissibility of that exhibit as it is an open account which is not involved in this particular suit, it is entirely self-serving, and as to what Western Machinery did with these checks and what records they made showing applying payment in any other manner than to-

(Testimony of Edwin J. Barshell.)

ward the account in issue, I contend that it is not material in this case.

Mr. Shapro: Your Honor, this is redirect examination. On cross-examination the defense offered through this witness and your Honor received a group of checks over my objection on the basis that they exceeded in amount the amounts applicable to this account. On redirect I have established through this witness and the Plaintiff's Exhibit No. 5 that three of the checks offered by the defendant are not applicable to the account for which they seek credit. In effect it is rebuttal, and it is certainly admissible for that purpose, your Honor.

The Court: I want to ask the witness to point out on Plaintiff's Exhibit 4 if there is any entry thereon of either one of these checks that you have mentioned as having been received by the plaintiff and applied on the Bellingham Coal Mines open account.

A. On that one, your Honor? [69]

The Court: Yes.

A. Yes.

The Court: Which one?

A. $28.14, your Honor, $204.84 and $1,612, your Honor.

The Court: The objection is overruled and Plaintiff's Exhibit 5 is now admitted.

(Plaintiff's Exhibit No. 5 for identification was admitted in evidence.)

(Testimony of Edwin J. Barshell.)

Mr. Shapro: I have no further questions, your Honor.

The Court: Have you any further recross-examination, Mr. Crosby?

Mr. Crosby: Yes, your Honor.

The Court: You may proceed.

Mr. Crosby: Is the letter from Mr. Little to Mr. Shapro marked for identification?

The Clerk: It is Defendant's Exhibit No. A-10.

(A letter dated Nov. 12, 1953, from Little, LeSourd, Palmer, Scott & Slemmons by Warren R. Slemmons, to Arthur P. Shapro, was marked Defendant's Exhibit No. A-10 for identification.)

Mr. Crosby: It is stipulated—Counsel, is it correct that it is stipulated that Mr. Little's [70] letter to you is admissible in evidence as showing the transmittal of the Check No. 1017 in the amount of $1,612.67?

Mr. Shapro: Yes.

Mr. Crosby: Is your Honor ready to proceed?

The Court: Yes, you may proceed.

Recross-Examination

By Mr. Crosby:

Q. Mr. Barshell, with reference to Check No. 1017 which you stated was applied toward the open account, did you receive that check through Mr. Shapro? A. We did.

Q. With reference to Check No. 929 in the

(Testimony of Edwin J. Barshell.)
amount of $204.84, did you receive any instructions from the Bellingham Coal Mine Company relative to the account toward which that check should be applied? A. 929?

Q. Yes, 929, in the amount of $204.84.

A. This check was never received by us.

Q. Who received that check?

A. The truck—the storage warehouse who held material to be delivered to Bellingham Mines when they withdrew it from storage for their use.

Q. And what equipment was that? [71]

A. That was repair parts shipped by us.

Q. With reference to Check No. 743 in the amount of $28.14, did you receive any instructions from Bellingham Coal Mine Company as to what account that should be applied to?

A. From an inspection of the check, Mr. Crosby, I don't know.

Mr. Crosby: I would like to have the witness handed Defendant's Exhibits A-6, 7, 8 and 9.

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. Barshell, will you please refer to Defendant's Exhibit No. A-8. Please tell the Court what that is.

A. A ledger sheet——

Mr. Shapro: That is objected to, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial and not proper recross-examination. An examination of your Honor of the ledger sheet which is A-8 I think will convince your Honor that

(Testimony of Edwin J. Barshell.)

it is not the proper subject of cross-examination. It's part of the affirmative defense.

Mr. Crosby: Your Honor, this is the ledger sheet showing the Northwestern Improvement Company's alleged open account and has information which is contrary to what Mr. Barshell has testified to and [72] shows——

The Court: The objection is sustained. You may offer it as a part of your case in chief and you may retain this witness in attendance for the purpose of calling him in that connection if you wish.

Mr. Crosby: I have no further questions of this witness.

Mr. Shapro: No more questions, your Honor.

The Court: Step down.

(Witness excused.)

The Court: You may call the next plaintiff's witness.

Mr. Shapro: The plaintiff at this time rests, your Honor.

The Court: The defendant may now proceed.

Mr. Crosby: Mr. Huckaba.

The Court: Do you waive the opening statement, Mr. Crosby?

Mr. Crosby: Yes, I waive my opening statement, your Honor.

The Court: Very well, then you may call Mr. Huckaba as a defendant's witness. He has already been sworn. Will you come forward and take the stand, Mr. Huckaba. [73]

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recalled as a witness in behalf of defendant, being previously duly sworn, was examined and testified further as follows:

Mr. Crosby: I would like to have handed to the witness Defendant's Exhibits A-1, 2 and 3, and also Plaintiff's Exhibits 1 and 2.

(The bailiff did as requested.)

Mr. Crosby: I would like to have this quotation of January 16th marked for identification.

The Clerk: They will be marked Defendant's Exhibits A-11 and A-12.

Mr. Crosby: I thought, your Honor, to expedite matters I would have marked all at once the exhibits which this witness will be referring to.

The Court: Let Counsel see if the ones handed him are the ones he last referred to. Do you wish those two marked as one exhibit?

Mr. Crosby: Yes. I believe they go together.

The Court: Is there any objection to that, Mr. Shapro?

Mr. Shapro: No, no objection, your Honor.

The Court: Is it your wish to include them in the same exhibit?

Mr. Crosby: The three blue sheets should be marked as one exhibit, your Honor. [74]

The Clerk: It will be marked Defendant's Exhibit A-11, your Honor.

(A quotation dated January 16, 1952, was marked Defendant's Exhibit No. A-11 for identification.)

(Testimony of J. Stanley Huckaba.)

The Clerk: Defendant's Exhibits A-12 and A-13.

(A letter dated January 29, 1952, from Earl R. McMillan to Western Machinery Co., was marked Defendant's Exhibit No. A-12 for identification.)

(A letter dated January 22, 1952, from Earl R. McMillan to Western Machinery Co., was marked Defendant's Exhibit No. A-13 for idenfication.)

Mr. Crosby: Your Honor, as to Exhibit No. 10——

The Court: Do you mean A-10?

Mr. Crosby: A-10, I would like to have that offered in evidence. That is Mr. Little's letter to Mr. Shapro.

The Court: Any objection?

Mr. Shapro: No objection, your Honor.

The Court: Admitted.

(Defendant's Exhibit No. A-10 for identification was admitted in evidence.)

Mr. Crosby: I have had marked for identification [75] as A-11 a three page quotation dated January 16, 1952.

The Court: Do you want to offer it or do you want to call it to the attention of the witness?

Mr. Crosby: I wanted to call these to the attention of the witness.

The Court: You may do so. Proceed.

(Testimony of J. Stanley Huckaba.)

Mr. Crosby: And Defendant's Exhibit A-12, a letter from Mr. McMillan to Western Machinery Company to the attention of Mr. Huckaba dated January 29, 1952, and what has been marked for identification Defendant's Exhibit A-13, a letter from Mr. McMillan to Western Machinery attention Mr. Huckaba dated January 22, 1952.

Direct Examination

By Mr. Crosby:

Q. Mr. Huckaba, in your negotiations with Mr. McMillan did you at any time tender to Mr. McMillan quotations for machinery to be used for the Bellingham Coal Mine which were prepared by you prior to the tendering of Plaintiff's Exhibit No. 1, which is the quotation that was finally acted upon?

Mr. Shapro: I object to the question, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue in this case and is hearsay [76] by reason of being merged in Plaintiff's Exhibit 1 which is the subject matter of and to which the witness has already testified was preceded by these previous quotations and negotiations.

Mr. Crosby: Your Honor, it is part of defendant's affirmative defenses. They have alleged first that the Northwestern Improvement Company received no consideration for the subject matter of this action, and it is another affirmative defense that the Bellingham Coal Mine Company received a consideration for the subject matter of this action,

(Testimony of J. Stanley Huckaba.)

which was machinery, and that later on the plaintiff took a promissory note from Bellingham Coal Mine and that by their action they knew that Bellingham Coal Mine was the principal and that Northwestern Improvement Company was the surety, and the cases that I have cited to your Honor in my memorandum——

The Court: That memorandum apparently is not in this file. Mr. Clerk, will you see if you can find it?

(The clerk handed papers to the Court.)

The Court: Which authorities?

Mr. Crosby: The Ninth Circuit case of Howell vs. War Finance Corporation and the case which that one cites, Hoffman vs. Habighorst, clearly state [77] that we can show by parol evidence that the plaintiff knew that there was a third party who was actually the principal and that the party with which they were dealing was in the position of a surety, and what we are wanting to do at this time by our affirmative defense is to show by parol evidence that——

The Court: Where is your affirmative defense, Mr. Crosby?

Mr. Crosby: With reference to the amended answer, your Honor, first affirmative defense on Page 1 of the amended answer, your Honor. Counsel and I have stipulated that in the fourth line the word "plaintiff" can be changed to "defendant."

(Testimony of J. Stanley Huckaba.)

The Court: Was it the first or second affirmative defense?

Mr. Crosby: Referring to the first affirmative defense and pointing out to your Honor that Counsel and I have stipulated that the word "plaintiff" in the fourth line of that first affirmative defense can be changed from "plaintiff" to "defendant."

The Court: Any objection?

Mr. Shapro: No objection, your Honor.

The Court: I have made the change.

Mr. Crosby: Thank you very much, your Honor.

The Court: I will hear you, Mr. Shapro. [78]

Mr. Shapro: Your Honor, there is a vast difference between parol evidence as such and the parol evidence rule. The case to which Counsel refers, particularly the Hoffman vs. Habighorst case, is indicative of the fact that agency or suretyship may be shown by parol evidence, and it may be shown by parol evidence and perhaps there is a way in the course of this defense where it might be shown, but we have here—the objections that are pending before your Honor are to a question concerning documents, quotations and correspondence dated and transmitted prior to the effective date of the contract which is the subject matter of this action, and regardless of agency, regardless of suretyship or otherwise it is our contention, if your Honor please, that any prior negotiations or any documents referring to prior negotiations are necessarily by virtue of the parol evidence rule inviolate when merged in the ultimate document. Counsel is not

(Testimony of J. Stanley Huckaba.)
seeking by this question to elicit from any extraneous source on a parol evidence basis the question of lack of consideration or the question of suretyship both by his pleadings made a part of his affirmative defense. These documents about which the pending question concerns itself are admittedly from the previous testimony of the witness and from the face of the documents [79] themselves matters which preceded the contract, were part of his negotiations with the defendant and with Mr. McMillan, its representative, and therefore, if your Honor please, cannot be used to impeach the subsequent document into which they are merged.

The Court: My understanding of the point here is that this exhibit is offered for the sole purpose of showing that the defendant was in fact acting for another and that the plaintiff knew it.

Mr. Shapro: I understand that is the purpose of it.

The Court: It is not for the purpose of changing any written word or meaning of any written contract. Is that——

Mr. Shapro: No, I don't concede that to be correct, your Honor, with due respect.

The Court: Is that——

Mr. Crosby: That is right, your Honor. What I purport to show by this witness is that the plaintiff knew that Bellingham Coal Mine was getting the benefit of this machinery and the cases that I have cited——

The Court: I am sorry, getting the benefit does

(Testimony of J. Stanley Huckaba.)
not necessarily release one from being the principal on the contract. [80]

Mr. Crosby: I realize that, your Honor, but we are entitled to show under these cases who actually received the benefit from this contract and that the plaintiff knew who was receiving the benefit.

The Court: Do you mean as a part of your allegation that the defendant was acting not as the principal, but as a surety and as an agent for the principal?

Mr. Crosby: That's right. Might I refer to the facts—pardon me, I didn't mean to interrupt.

Mr. Shapro: No, go ahead. I think the Court was addressing you, sir.

The Court: I wish to hear what it is that is the limit, if any, or limits, if any, on the offer made by you, and that is all I am interested in at this time.

Mr. Crosby: We are going to offer these exhibits and the testimony of this witness, not to alter the terms of the contract or order shown by Exhibits 1 and 2 of plaintiff, but to show that the plaintiff knew that the Northwestern Improvement Company was acting as an agent for the Bellingham Coal Mine Company, that the Bellingham Coal Mine Company was getting the benefit of the machinery, and that in fact the Bellingham Coal Mine Company was the principal, [81] and if the Northwestern Improvement Company is responsible, that they are responsible only as surety.

Mr. Shapro: And even for the limited purposes for which Counsel has stated he is offering this

(Testimony of J. Stanley Huckaba.)

evidence on this question to which our objection is pending, your Honor, we submit that it would be a violation of the parol evidence rule, that it is incompetent, irrelevant and immaterial so to admit it because one of the terms of the contract is the name of the purchaser, and if Counsel seeks to show by this evidence that that purchaser instead of acting for himself or itself was in fact acting for another or as a surety for another, he is in effect changing one of the principal terms of the contract, namely the identity of a party to it.

The Court: In the absence of some authority controlling this Court's action the Court is of the opinion and rules that this evidence is admissible for the limited purpose for which I understand defendant's Counsel offers it, not for the purpose of varying the terms of the contract but for the purpose only, and for no other, of showing or tending to show who was the real party in interest, in other words who was the principal, in this transaction, and for that limited purpose only it is received in evidence. The exhibit [82] number was what?

Mr. Crosby: Defendant's Exhibits Nos. A-11, A-12 and A-13.

The Court: The one I was ruling upon was A-11. That exhibit, the objections being overruled, is now admitted, Defendant's Exhibit A-11.

(Defendant's Exhibit No. A-11 for identification was admitted in evidence.)

The Court: Is there any other evidence about

(Testimony of J. Stanley Huckaba.)

any other one which you wish to offer by way of authenticating the documents for admission, A-12 or A-13?

Mr. Crosby: Yes, A-12 and A-13.

The Court: What is the evidence before the Court relating to authentication? And if there isn't any, proceed to inquire.

Mr. Shapro: The authenticity of the two exhibits A-12 and A-13 is conceded, your Honor.

The Court: You haven't——

Mr. Crosby: I haven't inquired as yet, I realize.

The Court: I wish to know what the facts are about them with respect to the issue here, if you are going to offer them in evidence, with respect to this limited purpose. I want to know what the evidence [83] is.

Mr. Crosby: Yes, your Honor.

Q. (By Mr. Crosby): Mr. Huckaba, referring to Exhibit A-11, which is a quotation of January 16th. you prepared that quotation and gave it to Mr. McMillan, didn't you?

A. That's correct, yes.

The Court: Ask him. You are not entitled to lead him. I wish you could expedite it.

Q. (By Mr. Crosby): Referring to Exhibit No. A-13, did you receive that letter? Did you personally receive that letter? A. Yes, I did.

Q. Exhibit No. A-13? A. Yes.

Q. When did you receive it, Mr. Huckaba?

A. Well, it was mailed to me on January 22nd

(Testimony of J. Stanley Huckaba.)

and I probably received it on about January 23rd, or 24th, 1952.

Q. And to what does the letter pertain?

Mr. Shapro: If your Honor please, the letter is the best evidence. It speaks for itself. We object on that ground.

The Court: No, the subject matter of the letter may be inquired into of this witness. The objection is overruled. To what it pertains may be [84] answered.

A. It pertains to the quotation made by myself to Mr. McMillan on January 16, 1952.

The Court: In what respect does it pertain to it, particularly as to with whom you were dealing in that transaction, if anything?

A. The quotation of January 16, 1952, was made to the Bellingham Coal Mines Company pertaining to coal washing equipment, and Mr. McMillan's letter of January 22, 1952, pertains to that same equipment and the prices and specifications given in the quotation.

The Court: You may inquire.

Mr. Crosby: I would like to offer in evidence——

The Court: The Court would like to know from this witness whether or not this letter and the other papers mentioned by him, to what transaction or transactions they apply, if he knows.

Q. (By Mr. Crosby): Mr. Huckaba, for what purpose did you make and prepare Exhibit No. A-11, which is the quotation of January 16, 1952?

A. It was in the process of negotiations between

(Testimony of J. Stanley Huckaba.)
myself and Mr. McMillan for a coal washing plant, and during that time we had various discussions and this is one of the quotations I made to him.

Q. At the time of preparing A-11, your quotation of January [85] 16th, who did you understand was going to purchase the coal washing plant?

A. The quotation was made to the Bellingham Coal Mines Company. The matter of purchase had not been discussed at that time, or terms of purchase.

The Court: May I ask you, with reference to that machinery which is mentioned in Plaintiff's Exhibits 1 and 2 and with reference to that machinery or merchandise which was mentioned in Defendant's Exhibits A-11, A-12 and A-13, what property, machinery or merchandise was referred to in these Defendant's Exhibits A-11, A-12 and A-13?

A. Well, Defendant's Exhibits A-11, A-12 and A-13 refer to an entirely different quotation for different machinery that was made on a previous date.

The Court: Is your last statement true of Defendant's Exhibit A-11?

A. Yes, sir.

The Court: The Court would like to reconsider its ruling.

Mr. Crosby: I would like to inquire further before the Court reconsiders, your Honor, because it does cover part of the same equipment.

The Court: Very well. You may inquire.

Q. (By Mr. Crosby): Mr. Huckaba, with ref-

(Testimony of J. Stanley Huckaba.)

erence to [86] Defendant's Exhibit A-11, referring to Item No. 1 which reads, "1 only C3 Wemco Mobil Mill," and with reference to Plaintiff's No. 1, of which Item No. 1 reads, "1 only C-3 Modified Wemco Mobil Mill," would you please advise the Court what similarities there are between those two pieces of equipment?

Mr. Shapro: I object to the form of the question, if your Honor please, upon the ground it is leading and suggestive. It assumes that there is a similarity.

The Court: That objection is sustained. On a proper question form the subject matter of the inquiry may be addressed to the witness after lunch. Is there any reason why Counsel could not return at 1:30?

Mr. Shapro: None at all, your Honor.

Mr. Crosby: No, your Honor.

The Court: Court is recessed until 1:30.

(Thereupon, at 12:00 o'clock noon, a recess herein was taken until 1:30 o'clock p.m.) [87]

Thursday, June 14, 1956—1:35 o'Clock P.M.

(All parties present as before.)

The Court: Are all present in the case on trial?

Mr. Shapro: Yes, your Honor.

Mr. Crosby: Yes, your Honor.

The Court: You may proceed. The witness will resume the stand.

J. STANLEY HUCKABA

resumed the stand:

Direct Examination
(Continued)

By Mr. Crosby:

Q. Mr. Huckaba, with reference to Defendant's Exhibit A-11, which is your quotation of January 16, 1952, would you please explain the purpose of Item No. 1, which is, "1 3-C Wemco Mobil Mill"?

The Court: As I recall, that exhibit is the one as to which the Court struck the ruling, is it not?

Mr. Crosby: Yes.

Mr. Shapro: You were about to strike it, your Honor. You didn't strike it.

The Court: You wished to ask one or two other questions before the Court ruled. [88]

Mr. Crosby: Yes, your Honor.

The Court: You may proceed.

A. The item to which you refer is Item No. 1, the one only 3-C Mobil Mill, which in a sense is the coal washing—a coal washing plant.

Q. (By Mr. Crosby): Now, with reference to Plaintiff's Exhibit No. 1 which is being handed to you, which is your quotation of February 20, 1952, please explain the purpose of Item No. 1 on that exhibit.

A. The purpose of Item No. 1, "1 only 3-C Modified Wemco Mobil Mill," is also another size of a coal treating plant.

Q. So that the two plants were designed to do the same work?

(Testimony of J. Stanley Huckaba.)

A. They are both coal washing plants.

Q. Yes. Now, on Page 2 of Defendant's Exhibit No. A-11 would you direct your attention, please, to Items No. 2 and No. 3, and with reference to Plaintiff's Exhibit No. 1 on Page 2 I direct your attention to Items No. 3 and No. 4. Would you please advise the nature of those items listed and state their difference or similarity?

A. They are the—the quotations are identical.

Mr. Crosby: Your Honor, those were all the questions I had in connection with A-11 to show the similiarity of the equipment listed on the two exhibits. [89]

The Court: I would like for Counsel on one side or the other to give this witness an opportunity to testify concerning all the circumstances surrounding these two exhibits with reference to the point of time of each and just what happened in respect to each, and including what relationships if any there may have been in the dealings with respect to the one and with respect to the other. It would be proper for plaintiff's Counsel to ask those questions at this time, and if defendant's Counsel wishes to ask any further questions about that subject later the Court will hear those questions if they are proper.

Cross-Examination

By Mr. Shapro:

Q. Mr. Huckaba, referring your attention to Defendant's Exhibit A-11, which is dated January 16,

(Testimony of J. Stanley Huckaba.)

1952, will you tell the Court whether or not that was a part of the negotiations which you previously testified to went on over a period of months between you and Mr. McMillan in connection with a coal washing plant for the Bellingham Coal Mine at Bellingham, Washington?

A. This quotation A-11, Defendant's Exhibit A-11, to the best of my knowledge was the first quotation given to Mr. McMillan after we got together with specific [90] reference to the Bellingham Coal Mines installation.

Q. Now, with respect to Plaintiff's Exhibit No. 1 which is dated February 20th, is that the last quotation you made?

A. That is the last quotation made.

The Court: What is the date of each?

A. The date of the first is January 16, 1952.

The Court: That is Plaintiff's Exhibit 1?

A. No.

The Court: Give the number of the exhibit.

A. Defendant's Exhibit A-11.

The Court: That is what you meant by "the first one"?

A. Yes, your Honor. That's my quotation of January 16, 1952.

The Court: Is that what you meant by your expression "was the first" a moment ago?

A. Yes, your Honor.

Q. (By Mr. Shapro): The date of Plaintiff's Exhibit No. 1 is what, Mr. Huckaba?

(Testimony of J. Stanley Huckaba.)

A. The date of Plaintiff's Exhibit No. 1 is February the 20th, 1952.

Q. And is that the one to which you referred in response to a question of mine as the last of the quotations [91] that you made to Mr. McMillan on this subject? A. Yes.

Q. Were there any quotations made by you on the washing plant between those two dates?

A. I believe there were verbal quotations only.

Q. Referring your attention to Item No. 1 on each of those two exhibits, A-11 for the defendant and Plaintiff's Exhibit No. 1, you have testified that they were both coal washing plants. Is there a difference in the size and price between the two as quoted in the two different quotations?

A. In——

The Court: Answer yes or no.

A. Yes.

Q. (By Mr. Shapro): Will you give the price quoted in Defendant's Exhibit A-11?

A. The price quoted in A-11 is $45,090 for the coal washing plant.

Q. And for the coal washing plant what is the price quoted in Plaintiff's Exhibit No. 1?

A. In Plaintiff's Exhibit No. 1 the price quoted was $56,860.

Mr. Shapro: I have no further questions on that subject, your Honor.

The Court: Do you feel that there ought to [92] be some further questions, Mr. Crosby? If so, you may ask them.

(Testimony of J. Stanley Huckaba.)

Redirect Examination

By Mr. Crosby:

Q. Would you please, Mr. Huckaba, explain the chassis, the size of the chassis for both pieces of equipment, that is, Item 1 listed on Exhibit A-11 and Item 1 listed on Exhibit No. 1? Any difference in the size of the chassis of the equipment?

A. I'll have to answer I don't know, because I don't understand what you're referring to by——

Q. The framework of the equipment.

A. I'll have to say I don't know. I don't have the dimensions here.

The Court: If you can do so of your own knowledge the Court asks you to state each and all of the differences in the identity of the two machines which occur to you at this time.

A. Well, the Size 3——

The Court: What are you referring to by "Size 3"? What exhibit is that in, if it is in either one?

A. In Defendant's Exhibit A-11 I refer to a Size one only 3-C, which means Size No. 3, [93] coal.

The Court: 103-C?

A. No, Size No. 3.

The Court: Oh, Size No. 3.

A. Yes.

The Court: All right. What does that mean?

A. Is a certain specification for a plant which will under normal circumstances treat about fifty tons per hour of coal, and consequently the equip-

(Testimony of J. Stanley Huckaba.)

ment contained in this type of plant is proportionately smaller than the equipment contained in the plant quoted in Plaintiff's Exhibit No. 1, which is a 3-C, Size No. 3-C modified, which means particularly that it's half way in size between a No. 3 plant and a No. 4 plant, and essentially the equipment contained in a No. 3 modified plant is suitable and a suitable size to treat about eighty tons of coal per hour under normal conditions.

The Court: The other one was fifty tons per hour and this is eighty tons, is that right?

A. Yes, sir.

The Court: Do you know of any other differences between the two machines, the one in Defendant's Exhibit A-11 and the one mentioned in Plaintiff's Exhibit 1?

A. There is of course a difference in the [94] sizes of individual equipment which I could enumerate if you wish.

The Court: If you can do so, please proceed.

A. Well, in the No. 3 Mobil Mill the drum separator or the separating vessel would be six feet in diameter by five feet long.

The Court: In what exhibit is that?

A. Defendant's Exhibit A-11. The medium or product screen has a 4 by 16 Allis Chalmers low head screen, a four inch medium return pump, while the plant mentioned in Plaintiff's Exhibit No. 1, the Size 3-C modified, contains an eight foot diameter by six foot long drum separator, a five

(Testimony of J. Stanley Huckaba.)

foot wide by 16 foot long Allis Chalmers product screen, and—oh, yes, a five inch medium circulating pump. That is essentially the difference in the machinery contained in the two plants, although there are other items contained which are essentially the same size.

The Court: Sometimes the Court does not readily understand why Counsel on both sides omit to develop information like this which is so important in a situation like that presented here. Does any one of Counsel wish to ask another question of this witness?

Mr. Crosby: Not in connection with these two quotations. [95]

The Court: Mr. Shapro?

Mr. Shapro: No, no further questions.

The Court: The Court is ready to rule finally on the matter of the proper admission in evidence and the correctness of the Court's last announced ruling by which the Court admitted Defendant's Exhibit A-11 in evidence. The Court strikes the Court's ruling previously announced admitting in evidence Defendant's Exhibit A-11. The same is rejected.

(Defendant's Exhibit No. A-11 for identification was rejected.)

Mr. Crosby: Your Honor, might I point out to the Court——

The Court: I have heard the facts, and even if you have something further to add I doubt that it

(Testimony of J. Stanley Huckaba.)

would change the Court's mind. We have already heard a good deal of comment from Counsel, Mr. Crosby. Unless you have a court case, like the Ninth Circuit, or a Supreme Court ruling which you believe honestly and sincerely controls this Court's specific ruling just now made, I do not wish to take up the time.

Mr. Crosby: I do, your Honor.

The Court: What is it?

Mr. Crosby: With reference to the Ninth [96] Circuit case of Howell vs. War Finance Corporation——

Mr. Koch: Is that in your brief?

Mr. Crosby: That is in the brief.

The Court: On the first page at the top of the page of the defendant's brief.

Mr. Crosby: Yes.

The Court: What are the facts in that case? How did the question arise? It causes a lot of discussion, but we will have to have it if you feel sincerely that it is controlling of this Court's particular ruling on this particular thing.

Mr. Crosby: Your Honor, in that case a party obtained a loan from a bank and that bank loan was eventually assigned to the defendant War Finance Corporation, and the lender was the only one shown on the loan. However, it was later developed and the Court permitted it by parol evidence that the loan was obtained for the purpose of still a third party, and the Court treated the lender as the surety and the third party as the principal. And the same similar facts were in Hoff-

(Testimony of J. Stanley Huckaba.)
man vs. Habighorst, which is the Oregon case quoted by the Ninth Circuit case which the Ninth Circuit says is the leading case, where the Court again permitted the parties who were stockholders of a corporation and the sole parties signing on a note to come [97] in and show that when making the loan the lender was advised that the corporation was to receive the funds, was the beneficiary of the loan.

The Court: Did you understand that any one of these cases involved one and the same piece of property?

Mr. Crosby: No, your Honor.

The Court: I am talking about these two cases.

Mr. Crosby: The Howell vs. War Finance case involves a separate set of circumstances than the Hoffman vs. Habighorst case. They are two separate cases, your Honor.

The Court: That isn't what I mean. I mean did the Howell case involve one piece of property or did it involve two pieces or more pieces of property?

Mr. Crosby: Well, it involved several pieces of property, your Honor, but they were all the subject of one transaction. However, in the Hoffman case there was only one instrument. That was the——

The Court: I would take it that that would be a much easier case, if you had the facts here, if it were the proof here that Defendant's Exhibit A-11 and Plaintiff's Exhibit 1 involve one and the same piece of property, Mr. Crosby, I say to

(Testimony of J. Stanley Huckaba.)

you as indicated [98] by the Court's first ruling admitting Exhibit A-11 that the Court would have a view different from this expressed finally.

Mr. Crosby: Well, your Honor, on Page 2 of No. 1 the witness stated that the two items on that page which are $3,100 and $3,600 are exactly the same as the items on Page 2 of Defendant's A-11, so that as for those——

The Court: I have been trying to get from this witness and from Counsel for about an hour now what is the fact about what is involved in the way of identity of property in the two exhibits.

Mr. Crosby: Well, your Honor, when we were speaking of Items 2 and 3 on A-11 the witness stated that they were exactly the same as Items 3 and 4 on No. 1, but in the last series of questions we were directing our questions I understood only to Item 1.

Mr. Shapro: That's right.

Mr. Crosby: But I'm sure, your Honor, that the testimony is unequivocal that as to Items 2 and 3 on A-11 they are exactly the same.

The Court: I am going to give Counsel in this case about three more minutes to develop the facts in this thing. I wish you would do so, if it has not already been done. Mr. Shapro, is there any other [99] question of this witness about the identity of this proerty?

Mr. Shapro: None whatsoever, your Honor, none whatsoever.

The Court: Then what have you to say about

(Testimony of J. Stanley Huckaba.)

the identity of the property? The Court's ruling proceeds upon the basis and it only is with respect to properties described in Plaintiff's 1 and Defendant's A-11 which is different. To the extent that these two exhibits involve one and the same property I do not intend to exclude the exhibit.

Mr. Shapro: I believe I understand your Honor's ruling and so that there may be no misunderstanding I agree with Mr. Crosby—this is the first time we have agreed on anything—I agree with Mr. Crosby that Items 3 and 4 on Plaintiff's Exhibit 1 and Items 2 and 3 on Defendant's Exhibit A-11 as the witness has testified are identical, but the Item 1 on both is vastly different. May I add, your Honor, to that observation that by reason of the difference between the Items No. 1 on both of the exhibits there is a difference of over $11,000 in the quoted price.

The Court: Is it your view that only as to Item No. 1 are the two exhibits different?

Mr. Shapro: Yes, your Honor. [100]

The Court: The Court's ruling is confined to Item 1 in each of the two exhibits. As to other items mentioned in the two exhibits, they will remain in evidence.

(Page 2 of Defendant's Exhibit No. A-11 for identification was admitted in evidence.)

The Court: Is that clear to Counsel?

Mr. Shapro: Yes, it is, your Honor.

Mr. Crosby: Yes, your Honor. Thank you.

(Testimony of J. Stanley Huckaba.)

The Court: That is the final ruling of the Court on this matter. At two o'clock we have to make some other arrangements about the calendar and I will have to excuse Counsel and the witness for a moment. So far as the Court is concerned we will take about a three-minute recess before resuming this further proceeding. Counsel are excused for at least ten minutes, I believe. If it is earlier I will try to notify you.

Mr. Shapro: Thank you, your Honor.

(Short recess.)

The Court: All are present as before the recess. The Court will further clarify the Court's ruling concerning the admission in evidence of what was at the time the Court last made a statement Defendant's Exhibit A-11 by stating the same result [101] as that last stated but in a different form in this manner: That A-11 by and with the consent of Counsel has been separated so as to give a new number to that part of what was A-11 but which part was rejected when last offered in evidence, and that new number assigned by the clerk is Defendant's Exhibit A-11-X, and in harmony with what the Court has already said, that part of what was Defendant's Exhibit A-11 and is now Defendant's Exhibit A-11-X is rejected. Further clarifying, what now is A-11 is admitted in evidence. There is no ruling changing the Court's former ruling admitting Plaintiff's Exhibit 1 in evidence. You may proceed.

(Testimony of J. Stanley Huckaba.)

Mr. Crosby: I would like to have handed to the witness Defendant's Exhibits A-1 and A-2 and A-3.

The Court: That will be done.

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. Huckaba, during your negotiations with Mr. McMillan did you make any reports to the San Francisco office of Western Machinery Company relative to your negotiations with Mr. McMillan? A. Yes.

Q. Referring to Defendant's Exhibits A-1, A-2 and A-3, are there notes on those exhibits relative to your negotiations with Mr. McMillan?

A. Yes. [102]

Q. And are those notes relative to the equipment shown on Defendant's Exhibit A-11 and on Items 3 and 4 of Plaintiff's Exhibit 1?

A. There are notes in Defendant's Exhibit A-1 concerning the equipment that was quoted in the quotation marked Defendant's Exhibit A-11.

Mr. Shapro: Your Honor, may the witness see A-11 as it now stands?

The Court: Yes.

Mr. Shapro: I'm not sure that he understands what was done.

(Defendant's Exhibit A-11 was handed to the witness.)

The Court: What you now have is one sheet of paper. That is all there is of A-11 left in the exhibit to be known as such.

(Testimony of J. Stanley Huckaba.)

A. I would like to modify my statement, saying that I see no reference specifically to A-11 in these sales report forms.

Q. (By Mr. Crosby): Your notes in A-1, -2 and -3 then refer to your negotiations with Mr. McMillan concerning the sale of equipment to Bellingham Coal Mine Company? A. Yes.

Q. What is the nature of the notes which you refer to?

Now, specifically with reference to Defendant's Exhibit [103] A-1, please refer to the note on that exhibit.

The Court: But do not read it out loud in evidence, because it is not in evidence.

Q. (By Mr. Crosby): Please refer to the note on that exhibit relative to the sale of equipment to Bellingham Coal Mine Company.

The Court: By "nature" I think Counsel means to include "subject matter."

Mr. Crosby: Yes.

A. May I make a correction in this? A-1 is written concerning Northwestern Improvement Company. A-2 and A-3 are written to Bellingham Coal Company. You're referring now to A-1?

Q. (By Mr. Crosby): A-1, yes. Are there any notes on A-1 with reference to sale of equipment to Bellingham Coal Mine? A. No.

Q. Are there any notes there with reference to your negotiations with Mr. McMillan concerning the sale of equipment to be placed in the Bellingham Coal Mine? A. Yes.

(Testimony of J. Stanley Huckaba.)

Q. What is the subject matter of the note on Exhibit A-1 with reference to the negotiations with Mr. McMillan for the sale of equipment to be put in the Bellingham Coal Mine? [104]

The Court: What type of information is disclosed by the note to a stranger looking at it? You don't have to say what the information is, but what type of information is it, what is its nature?

A. The nature of the information concerning Bellingham Coal Mines Company?

Q. (By Mr. Crosby): Concerning the equipment which was——

The Court: That is leading again, Mr. Crosby.

Mr. Crosby: I'm sorry. I will strike that.

The Court: Try to avoid leading.

Q. (By Mr. Crosby): What is the subject matter and the nature of the note, Mr. Huckaba?

A. The only matter mentioned is the mention of Mr. McMillan consulting with the Board of Directors of Bellingham Coal Mine Company. That's the only mention.

Q. For what purpose?

Mr. Shapro: That's leading, if your Honor please. Furthermore, that's giving the contents of a document that hasn't been received in evidence.

The Court: The objection is sustained. The purpose will have to be observed from the writing.

Q. (By Mr. Crosby): Now, with reference to Exhibit A-2, Defendant's A-2, is there any note on A-2 which refers to your negotiations with Mr. McMillan and the furnishing of equipment to be placed

(Testimony of J. Stanley Huckaba.)

in the coal mine [105] of Bellingham Coal Mine at Bellingham, Washington? A. No.

Q. Does the exhibit refer in any place to your negotiations with Mr. McMillan or with the furnishing of equipment to the Bellingham Coal Mine Company?

Mr. Shapro: I submit, if your Honor please, the question has been asked and answered and also is in the nature of impeachment of his own witness, cross-examination of his own witness.

The Court: What have you to say to the last statement, Mr. Crosby?

Mr. Crosby: I submit——

The Court: The objection is overruled. Do you have in mind the question? If you don't we will have it read.

A. Will you read the question?

The Court: Please read the question, Mr. Reporter.

(The reporter read the last question.)

The Court: Answer yes or no.

A. Yes.

Q. (By Mr. Crosby): What is the nature of the reference, Mr. Huckaba?

Mr. Shapro: Without giving the contents of the document. [106]

The Court: Yes, avoid saying what the information is stated in the reference. What is the nature of the reference?

A. The nature of the reference is regarding a

(Testimony of J. Stanley Huckaba.)

meeting of the Board of Directors of the Bellingham Coal Mines Company.

Q. (By Mr. Crosby): Referring to Defendant's Exhibit A-3, is there any reference on that exhibit which refers to the furnishing of the equipment which was the subject of your negotiations with Mr. McMillan for the Bellingham Coal Mine Company?

A. There is a note regarding a Board of Directors meeting of the Bellingham Coal Mines Company.

The Court: In what exhibit?

A. It's on Exhibit A-3.

Mr. Crosby: May the witness now have Exhibits A-12 and A-13?

(The exhibits referred to were handed to the witness.)

Q. (By Mr. Crosby): To what does Exhibit A-13 refer, Mr. Huckaba?

A. Exhibit A-13 refers specifically to a quotation I made to Mr. McMillan dated January 16, 1952.

Q. Is there any reference in Exhibit A-13 to the equipment listed on Defendant's Exhibit [107] A-11? A. Yes.

Mr. Crosby: I would like to ask that Defendant's Exhibit A-13 be admitted in evidence. It pertains to the subject matter of the equipment quoted in Mr. Huckaba's quotations shown in Defendant's Exhibit A-11 and Plaintiff's Exhibit No. 1, a portion of No. 1.

(Testimony of J. Stanley Huckaba.)

Mr. Shapro: Your Honor, we have no objection to the receipt in evidence of Defendant's Exhibit A-13 other than and subject to the same objections that we made with respect to that part of A-11 which was admitted in evidence by your Honor over our objections.

The Court: Do you offer it for the same purpose as that for which the Court admitted A-11, namely the purpose of showing that whatever it did in this case and respecting the transaction involved in this case by the defendant, it did it as the agent of someone else?

Mr. Crosby: That is right, your Honor. It pertains to——

The Court: Is that the purpose for which you offer it?

Mr. Crosby: It pertains to our affirmative defenses, your Honor.

Mr. Koch: That isn't specific enough. [108]

The Court: I wish to know——

Mr. Crosby: It pertains to the affirmative defenses.

The Court: Which affirmative defenses?

Mr. Crosby: Affirmative Defenses Nos. 1 and 4, your Honor.

The Court: What do you understand those defenses to be? State what each is.

Mr. Crosby: Affirmative Defense No. 1, your Honor, states that the Northwestern Improvement Company received no consideration for the subject matter of the lawsuit, which is the machinery, and

(Testimony of J. Stanley Huckaba.)

that as to the question of suretyship which is stated in Affirmative Defense No. 4, that the Bellingham Coal Mines Company is the true principal for the transactions involved.

The Court: Does either one of these defenses allege in addition to suretyship that you keep referring to anything regarding the relationship of principal and agent between the Bellingham Coal Mines Company and——

Mr. Crosby: No.

The Court: I understood it did.

Mr. Crosby: Not as far as principal and agent.

The Court: You have alleged suretyship, is that right? [109]

Mr. Crosby: It is our contention that if the Northwestern Improvement Company is obligated, it is as a surety, and that the Bellingham Coal Mine Company is the true principal.

The Court: For that limited purpose mentioned, namely as evidence of the allegations in defendant's Affirmative Defense No. 1 and Affirmative Defense No. 4, and only that, Defendant's Exhibit A-13 is now admitted.

(Defendant's Exhibit No. A-13 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Mr. Huckaba, referring to Defendant's Exhibit A-12, would you please state the nature of that exhibit?

Mr. Shapro: Your Honor, to save a little time, we are familiar with it, we have no objection to the

(Testimony of J. Stanley Huckaba.)

introduction in evidence of Exhibit A-12 subject to the same reservation that I made with respect to A-13.

Mr. Crosby: That is satisfactory with me, your Honor.

The Court: And you so offer it?

Mr. Crosby: I so offer it, your Honor.

The Court: Defendant's Exhibit A-12 is now offered as evidence of the allegations in [110] defendant's Affirmative Defenses 1 and 4, and for that purpose only it is admitted.

(Defendant's Exhibit No. A-12 for identification was admitted in evidence.)

Mr. Crosby: Then I would like to also offer Defendant's Exhibits A-1, -2 and -3 for the same purpose.

Mr. Shapro. To which offer, your Honor, we object most strenuously upon the ground that there has been no proper foundation laid. There is no identity of description, no identity of subject matter in Exhibits A-1, A-2 and A-3 with Exhibit A-11, none whatsoever. The witness has so testified and the documents so show.

Mr. Crosby: Your Honor, Plaintiff's Exhibit No. 2, which is admitted in evidence, states, "As you know, this equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager * * *" and Exhibits Nos. A-12 and A-13 make similar reference, and the

(Testimony of J. Stanley Huckaba.)

notes of Mr. Huckaba which are Exhibits A-1, -2 and -3 have similar references.

Mr. Shapro: No your Honor, such is not the fact. Exhibits A-12 and A-13——

The Court: Let defendant's Counsel see [111] them.

(The exhibits referred to were handed to Mr. Shapro.)

Mr. Shapro: Exhibits A-12 and A-13 that have been admitted for that limited purpose refer to the quotation of January 16th, which is A-11. That is, one page of it is A-11. The Exhibits A-1, A-2 and A-3 predate Exhibit A-11 and have no reference whatever to the subject matter, namely the two items of equipment that are on the page marked A-11, none whatsoever.

Mr. Crosby: Defendant's Exhibit No. A-13, which is admitted in evidence for a limited purpose, is a letter dated January 22, 1952, states, "We also accept the proposal to furnish to Bellingham Coal Mines the following additional equipment * * *" and the two items—the three items listed there are the items shown on Defendant's Exhibit A-11.

Mr. Shapro: That is correct.

Mr. Crosby: They are itemized.

Mr. Shapro: That is correct.

Mr. Crosby: Likewise Defendant's Exhibit A-12, which is admitted in evidence for a limited purpose, states, "Owing to the fact that it has been necessary for the Board of Directors of the Bellingham Coal

(Testimony of J. Stanley Huckaba.)

Mines Company to postpone their meeting [112] until sometime during the week of February 4th, it will therefore be impossible to get the Board's approval of our order with you within the ten day option."

Now, those are the exact subject matters which Mr. Huckaba stated were subject matters of his notes which are shown on Defendant's Exhibits A-1, -2 and -3.

Mr. Shapro: Your Honor, could I ask the bailiff to hand those Exhibits A-1, -2 and -3 to your Honor? There is no descriptive matter in there concerning those items of equipment. Counsel misstates it.

(The exhibits referred to were handed to the Court.)

Mr. Crosby: They refer, as I stated, to the references in the letters. I would like to——

The Court: Where do you find that?

Mr. Crosby: On A-1, your Honor, the last paragraph which states, "Sorry about." It refers to the ten day cancellation notice which is referred to in Defendant's Exhibit A-13.

The Court: May I see that, A-13.

(Defendant's Exhibit No. A-13 was handed to the Court.)

Mr. Crosby: The last paragraph of A-13.

The Court: Did you note that, Mr. [113] Shapro?

(Testimony of J. Stanley Huckaba.)

Mr. Shapro: Yes, but I still maintain, your Honor, there is no reference to the description of any equipment in Exhibit A-1, none whatsoever. The only similarity is that there is a reference to a ten day delay. Now, your Honor has admitted A-13 because it identifies the very same equipment which is on A-11.

The Court: And not for any other purpose?

Mr. Shapro: And not for any other purpose, that's right, your Honor.

Mr. Crosby: Your Honor——

Mr. Shapro: I mean the limited purpose that your Honor stated, yes.

The Court: What was the limited purpose then as you understood it?

Mr. Crosby: For the purpose of proving our Affirmative Defenses Nos. 1 and 4. That same paragraph, your Honor, also——

The Court: The objection to A-1 will have to be overruled. I didn't quite understand one thing, though. Is the offer for the purpose only of furnishing evidence as to Defenses 1 and 4?

Mr. Crosby: That is right, your Honor.

The Court: Very well. Defendant's Exhibit A-1 is now admitted in evidence, limited in its evidentiary purpose and use to the defendant's [114] Defenses 1 and 4.

(Defendant's Exhibit No. A-1 for identification was admitted in evidence.)

(Testimony of J. Stanley Huckaba.)

The Court: Now, with respect to A-2.

Mr. Crosby: A-2, your Honor, I would like to direct your attention——

The Court: A-2 is in two pages, two sheets. Is there any objection to that offer?

Mr. Shapro: Yes, your Honor, the same objection as to A-1 again.

The Court: What is the similarity?

Mr. Crosby: Your Honor, on the second page there is a note about three-fourths of the way down——

The Court: "Mine"—m-i-n-e—"is closed"?

Mr. Crosby: I'm sorry, your Honor, the photostatic copies——

The Court: M-i-n-e?

Mr. Crosby: No, the photostatic copies I have, your Honor, were given to me. They are in a little different form than those, the pages are different.

The Court: Read it, please.

Mr. Crosby: I'm referring to a note. It says "Note" about three-quarters of the way down and underlined. [115]

The Court: I don't see it. I can't pick it up. A-3 is one that has a note.

Mr. Crosby: All right, your Honor, the ones that were furnished to me, the pages were different. I'm sorry. I was referring to A-3.

The Court: The Court will abandon the Court's question about A-2. I ask you, is there an offer of Defendant's Exhibit A-3 for the same limited purpose, namely as evidencing the allegations set out in

(Testimony of J. Stanley Huckaba.)
defendant's Affirmative Defenses No. 1 and No. 4?

Mr. Crosby: That is right, your Honor.

The Court: Any objection?

Mr. Shapro: We object, if your Honor please, upon the same grounds as before, namely that there is no identity of subject matter so far as the equipment is concerned in A-3 with the subject matter of A-11 and Plaintiff's Exhibit 1.

The Court: What is your response to that?

Mr. Crosby: Your Honor, the note refers to the same subject matter that is referred to——

The Court: The directors?

Mr. Crosby: The action of the directors of the Bellingham Coal Mine Company.

The Court: What is the next word?

Mr. Crosby: "The directors meeting of the [116] Bellingham" is the first line.

The Court: The objections are overruled. For the limited purpose offered, A-3 is now admitted.

(Defendant's Exhibit No. A-3 for identification was admitted in evidence.)

Mr. Shapro: Your Honor, Exhibit A-2 was offered, to which we objected. May we have a ruling on that, your Honor?

The Court: I want to know if there is anything on that that refers to——

Mr. Crosby: Your Honor, with reference to the first page down about two-thirds of the way where there are listed Items 1, 2 and 3, above that it says, "I have proposed to Rod—."

(Testimony of J. Stanley Huckaba.)

The Court: That is the first page?

Mr. Crosby: Yes, the first page, and Item 3—or, "I have proposed to Rod—1. We go—" and so on.

Mr. Shapro: Those items, your Honor, the witness has testified refer to a construction job of the Western Engineering Division, not a washing plant for the Bellingham Coal Mines.

Mr. Crosby: "We go to Seattle and talk to McMillan."

Mr. Shapro: Again, your Honor, the witness testified it was a construction job, not this [117] washing plant equipment at all.

Mr. Crosby: If there is any doubt about it we would like to inquire of the witness.

The Court: You may inquire further. Let the witness see the exhibit.

(Defendant's Exhibit No. A-2 for identification was handed to the witness.)

Q. (By Mr. Crosby): Mr. Huckaba, referring to Defendant's Exhibit A-2, about two-thirds of the way down where there are a series of three notes numbered, do those notes refer to the transaction about which you have been testifying, your negotiations with Mr. McMillan?

Mr. Shapro: On the—may I qualify it, your Honor? On the washing plant for the Bellingham Coal Mines.

Q. (By Mr. Crosby): Yes, on the washing plant for Bellingham Coal Mine Company.

(Testimony of J. Stanley Huckaba.)

A. They refer specifically to a construction job I'm discussing here.

The Court: And where was that, if you recall?

A. A construction job at the Bellingham Coal Mines Company property and referring——

The Court: What was that as compared with the sale of merchandise involved in Plaintiff's [118] Exhibits 1 and 2?

A. This specifically refers to the construction of the building and the placement of equipment.

The Court: What equipment?

A. The equipment, or the coal washing plant, which would be—in a sense the answer to your question would be yes.

Q. (By Mr. Crosby): Then referring to the last paragraph there where it says, "Sam Moses & myself," is your answer to that the same, that that last paragraph also refers to the installation and the equipment——

The Court: I think you should ask him to what it refers.

Mr. Crosby: Sorry, your Honor.

Q. (By Mr. Crosby): To what does that refer, the last paragraph on the first sheet of Defendant's A-2? The first sheet. The last paragraph on the first sheet, Mr. Huckaba.

A. It refers to a trip that Mr. Moses and I took to Bellingham, and I took some pictures there of the existing tipple with reference to having the construction division of Western Machinery Company

(Testimony of J. Stanley Huckaba.)

construct additional facilities required for treating of the coal at that mine. [119]

Mr. Crosby: I make an offer of Defendant's Exhibit A-2 for the limited purpose similar to A-1 and A-3.

Mr. Shapro: To which we object, if your Honor please, upon the ground no proper foundation has been laid as to identity, and as a matter of fact that the evidence shows that the subject matter in essence is something foreign to this action, namely a construction job that was never undertaken by the plaintiff.

The Court: The objection is overruled, and for the limited purpose offered Defendant's Exhibit A-2 is now admitted in evidence.

(Defendant's Exhibit No. A-2 for identification was admitted in evidence.)

Mr. Crosby: I have no further questions of this witness, your Honor.

The Court: You may examine.

Mr. Shapro: Yes, your Honor. I ask that this document be identified.

The Clerk: It will be marked Plaintiff's Exhibit No. 6.

(A sales report dated Feb. 2, 1952, was marked Plaintiff's Exhibit No. 6 for identification.) [120]

(Testimony of J. Stanley Huckaba.)

Recross-Examination

By Mr. Shapro:

Q. Mr. Huckaba, I ask you to examine Plaintiff's Exhibit 6 and ask if that was written by you?

A. Yes, sir.

Q. Was anything to your recollection enclosed with the document marked Plaintiff's Exhibit 6?

A. Yes, sir.

Q. What document? A. A letter.

Q. A letter. Which letter? Can you identify it by exhibit number?

Mr. Shapro: May the witness be shown Exhibits A-12 and A-13, your Honor?

The Court: Yes, that may be done.

(The exhibits referred to were handed to the witness.)

A. It contained Defendant's Exhibit A-12.

Mr. Shapro: At this time we offer in evidence, if your Honor please. Plaintiff's Exhibit 6.

Mr. Crosby: I have no objection.

The Court: Admitted.

(Plaintiff's Exhibit No. 6 for identification was admitted in evidence.)

Q. (By Mr. Shapro): Mr. Huckaba, will you examine—— [121]

The Court: What do you call that, Mr. Huckaba, referring to Plaintiff's Exhibit 6?

A. This is a sales order form that was written

(Testimony of J. Stanley Huckaba.)

by myself as an explanation of Defendant's Exhibit A-12 asking that they grant the request to delay——

The Court: What I want is a name for the paper.

A. Sales report form.

The Court: Sales order form——

A. Report form.

The Court: Sales order report form?

A. Sales order form—excuse me, sorry. Sales report form.

Q. (By Mr. Shapro): Mr. Huckaba, will you again examine Plaintiff's Exhibit No. 1, and can you tell the Court the reason for the change of name from Bellingham Coal Mines Company to Northwestern Improvement Company appearing upon the face of Plaintiff's Exhibit No. 1? Answer that question yes or no, please. A. Yes.

Q. Will you tell the Court the reason?

Mr. Crosby: I object to that question as already covered. In plaintiff's direct examination this witness stated he didn't know the reason for the [122] change.

Mr. Shapro: He did no such thing, your Honor. He merely testified that he got it back with a rubber stamped name over it. The question of the reason was never gone into on our case at all. Now I'm cross-examining this witness who was offered by the defendant on the subject matter of incidentally the affirmative Defenses Nos. 1 and 4.

The Court: The objection is overruled.

A. During the final negotiations for the place-

(Testimony of J. Stanley Huckaba.)

ment of the order which occurred on February 22 as quoted in Plaintiff's Exhibit No. 1 the matter of credit or the ability of Bellingham Coal Mines Company to purchase a plant arose, and naturally the investigation of the credit of Bellingham Coal Mines Company would have taken a matter of two to three weeks, and due to the fact that it was a newly organized company I felt that credit for Bellingham Coal Mines Company would not be extended by our San Francisco office, and knowing that Northwestern Improvement Company was a well financed company and well able to place an order on open account I asked Mr. McMillan to place the order in Northwestern Improvement Company's name.

Mr. Shapro: No further questions.

Mr. Crosby: I have no questions. [123]

The Court: Step down.

(Witness excused.)

The Court: Call the next witness.

Mr. Crosby: Mr. McMillan.

EARL R. McMILLAN

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Crosby:

Q. Would you please state your name?

A. Earl R. McMillan.

Q. And your address?

(Testimony of Earl R. McMillan.)

A. 1012 Smith Tower, Seattle.

Q. That is your business address?

A. Yes, sir.

Q. Mr. McMillan, what if any business capacity did you have with the Bellingham Coal Mines Company?

A. I was manager of coal operations.

Q. During what period?

A. Beginning January 1, 1952, and continuing through 19—until early 1955.

Q. Did you have any other capacity with that company?

A. I was a member of the Board of Directors, or a member of the Board. [124]

Q. During what period?

A. From the time of incorporation of the company, which was on or about November 1, 1951, until some time late in 1954.

Q. At any time did a representative of the Western Machinery Company contact you concerning the furnishing of equipment to the Bellingham Coal Mine Company? A. Yes, sir.

Q. And who was that?

A. Mr. Huckaba.

The Court: You don't speak the name very plainly and distinctly. What is the name?

A. Mr. Huckaba.

The Court: Thank you.

Q. (By Mr. Crosby): Approximately when did Mr. Huckaba contact you?

(Testimony of Earl R. McMillan.)

A. It was some time early in January of 1952, is my recollection.

Q. Was this a personal call in person? Did Mr. Huckaba come to see you in person or was it a telephone call?

Mr. Shapro: I object to the form of the question, your Honor, on the ground it is leading.

The Court: It is. Objection sustained.

Q. (By Mr. Shapro): How did Mr. Huckaba contact you?

A. I don't recall whether it was preceded by a telephone [125] call or not, but he came in person to see me early in January.

Q. Where did he see you early in January?

A. He came to see me in the Smith Tower in Seattle.

Q. What did Mr. Huckaba say was the purpose of his call?

Mr. Shapro: If your Honor please, if he is going to ask for conversation I'm going to object to asking him for parts of it on the ground it is leading.

The Court: Yes; that objection is sustained.

Q. (By Mr. Crosby): What was discussed? Did you have any discussions with Mr. Huckaba at that time? A. Yes, sir.

Q. What were the nature of those discussions?

Mr. Shapro: I think the question should be the substance of them or the discussions themselves.

The Court: The objection is sustained. Ask him what if anything he said and what if anything Mr. Huckaba said, if he can recall; and if he can't

(Testimony of Earl R. McMillan.)

recall, state the substance of what each one said, something like that, Mr. Crosby.

Mr. Crosby: Thank you, your Honor.

Q. (By Mr. Crosby): If you recall, Mr. McMillan, what was the substance of what Mr. Huckaba said at the time he came to see you in the Smith Tower in early January of 1952? [126]

Mr. Shapro: I want to object again, if your Honor please, upon the ground that the question is leading and suggestive. He should call for the entire conversation, not just one half of it.

The Court: Did you confine his answer to a certain subject?

Mr. Crosby: No; I did not, your Honor.

Mr. Shapro: Yes; what one person said, what Mr. Huckaba said.

Mr. Crosby: What Mr. Huckaba said.

The Court: The objection is overruled.

The Witness: Will you read the question back again, please?

(The reporter read the question back as follows:

("Q. If you recall, Mr. McMillan, what was the substance of what Mr. Huckaba said at the time he came to see you in the Smith Tower in early January of 1952?")

A. The substance of the call was to inquire whether or not the Bellingham Coal Mines Company would be interested in the purchase of a heavy media separation plant, which is a type of

(Testimony of Earl R. McMillan.)

coal cleaning plant, and if so he would like to promote or make a proposal to furnish [127] such a plant.

Q. (By Mr. Crosby): And what did—is that all that you have on his conversation?

A. That was the purpose of his call, and my answer to that was that a proposal would certainly be given due consideration. I thought the Bellingham Coal Mines Company would be interested in installing that type of equipment.

Q. Were there any subsequent conversations, personal conversations between you and Mr. Huckaba prior to January 16th of 1952?

A. I don't recall just what dates. We had frequent conversations, some by telephone, long distance telephone between Seattle and Spokane. Mr. Huckaba agreed at the conclusion of our first discussion to submit a proposal, which was on or about January 15, 1952.

Q. Referring to Defendant's Exhibit A-11, do you recognize that Exhibit, Mr. McMillan?

A. Yes, sir.

Q. Prior to receiving that exhibit were there any other discussions of the subject matter discussed between yourself and Mr. Huckaba?

Mr. Shapro: I submit, if your Honor please, an objection to the question that it is leading and suggestive. [128]

Mr. Koch: It was just covered in the preceding two questions ago and now he's going over it again. He didn't get what he wanted.

(Testimony of Earl R. McMillan.)

The Court: I think the latter—however, let one Counsel conduct the matter. If Mr. Shapro is conducting the examination and the cross-examination, I prefer to hear him without assistance, but if Mr. Koch undertakes similar work with respect to the witness——

Mr. Koch: No, your Honor.

The Court: That is quite agreeable to the Court, too. This objection is sustained.

Q. (By Mr. Crosby): What office is at 909—or pardon me, in the Smith Tower where you and Mr. Huckaba had the meeting that you mentioned?

A. The meeting was in Room 1012 Smith Tower.

Q. Whose business office is that?

A. The Northwestern Improvement Company. It also served as the Seattle office of the Bellingham Coal Mines Company.

Q. Were there any discussions between yourself and Mr. Huckaba relative to the connection between Bellingham Coal Mines Company and Northwestern Improvement Company?

Mr. Shapro: Your Honor, I object on the ground it is leading and suggestive. [129]

Mr. Crosby: I think it is perfectly proper, your Honor. I haven't asked for the substance of the conversation. It is perfectly proper cross-examination.

The Court: Read the question, please, Mr. Reporter.

(The reporter read the last question as follows:

(Testimony of Earl R. McMillan.)

coal cleaning plant, and if so he would like to promote or make a proposal to furnish [127] such a plant.

Q. (By Mr. Crosby): And what did—is that all that you have on his conversation?

A. That was the purpose of his call, and my answer to that was that a proposal would certainly be given due consideration. I thought the Bellingham Coal Mines Company would be interested in installing that type of equipment.

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A. I don't recall just what dates. We had frequent conversations, some by telephone, long distance telephone between Seattle and Spokane. Mr. Huckaba agreed at the conclusion of our first discussion to submit a proposal, which was on or about January 15, 1952.

Q. Referring to Defendant's Exhibit A-11, do you recognize that Exhibit, Mr. McMillan?

A. Yes, sir.

Q. Prior to receiving that exhibit were there any other discussions of the subject matter discussed between yourself and Mr. Huckaba?

Mr. Shapro: I submit, if your Honor please, an objection to the question that it is leading and suggestive. [128]

Mr. Koch: It was just covered in the preceding two questions ago and now he's going over it again. He didn't get what he wanted.

(Testimony of Earl R. McMillan.)

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A. The meeting was in Room 1012 Smith Tower.

Q. Whose business office is that?

A. The Northwestern Improvement Company. It also served as the Seattle office of the Bellingham Coal Mines Company.

Q. Were there any discussions between yourself and Mr. Huckaba relative to the connection between Bellingham Coal Mines Company and Northwestern Improvement Company?

Mr. Shapro: Your Honor, I object on the ground it is leading and suggestive. [129]

Mr. Crosby: I think it is perfectly proper, your Honor. I haven't asked for the substance of the conversation. It is perfectly proper cross-examination.

The Court: Read the question, please, Mr. Reporter.

(The reporter read the last question as follows:

(Testimony of Earl R. McMillan.)

("Q. Were there any discussions between yourself and Mr. Huckaba relative to the connection between Bellingham Coal Mines Company and Northwestern Improvement Company?")

The Court: The objection is overruled.

A. The answer is yes.

Q. (By Mr. Crosby): Would you please state what you said in that regard and what Mr. Huckaba said, if anything, in that regard?

A. Well, in substance I explained to Mr. Huckaba first that the Bellingham Coal Mines Company was a newly organized company, had taken over the property and mine of the former Bellingham Coal Mine, and that Northwestern Improvement Company had agreed to operate the mine for the Bellingham Coal Mines Company under a contract for a fixed fee and that the Northwestern Improvement Company had no financial interest in the [130] Bellingham Coal Mines Company and that Northwestern Improvement Company under this management agreement was proceeding to rehabilitate and operate the mine for the Bellingham Coal Mines Company.

Q. Following your receipt of Defendant's Exhibit No. A-11 did you do anything further in connection with that exhibit?

Mr. Crosby: May the witness be handed Defendant's Exhibits A-12 and A-13?

(The bailiff did as requested.)

(Testimony of Earl R. McMillan.)

Q. (By Mr. Crosby): Again, Mr. McMillan, following your receipt of Defendant's Exhibit No. A-11, what if anything further did you do in connection with that exhibit?

A. I wrote a letter to Western Machinery Company in care of Mr. Huckaba at Spokane.

Q. Is that one of the exhibits that you have?

A. It's the exhibit marked A-13.

Q. Following your writing of Exhibit A-13 did you do anything else, anything further in connection with Defendant's Exhibit No. A-11?

A. Yes, sir.

Q. What was that?

A. I wrote a letter on January 29, 1952, to Western Machinery Company, attention Mr. Huckaba. It's marked Defendant's Exhibit A-12. [131]

Q. Now, following the sending of that correspondence did you have any further meetings or conversations with Mr. Huckaba, that is in the immediate future during the latter part of January, 1952, or the early part of February, 1952?

A. Yes, sir.

Q. Please state what meetings you had and where they were.

A. I don't recall the number of meetings. We had several meetings. Some were in Seattle, some were in Bellingham.

Q. Where were the meetings in Bellingham?

A. At the Bellingham Coal Mines Company mine.

Q. I see. Could you give the approximate

(Testimony of Earl R. McMillan.)

number of times you and Mr. Huckaba went up to the Bellingham Coal Mine?

A. No; I can't give the approximate number of times. We made several trips to the mine, some before and some after the starting of construction, or the installation of equipment.

Q. What if anything was discussed with Mr. Huckaba at those meetings and trips to Bellingham? A. Well, shortly following——

Mr. Shapro: If your Honor please, I'm going to ask your Honor to ask counsel to divide the question with respect to before or after the time of Plaintiff's [132] Exhibit No. 1, because I may have objection to offer if it refers to anything prior to February 20, 1952.

Mr. Crosby: I think that is perfectly proper and I will do so, your Honor.

The Court: Very well.

Q. (By Mr. Crosby): Mr. McMillan referring to your discussions and meetings with Mr. Huckaba subsequent to his furnishing of Exhibit A-11 on or about January 16th but prior to February 20, 1952, which is the date of Plaintiff's Exhibit No. 1——

Mr. Shapro: What is the question?

Q. (By Mr. Crosby): What if anything was discussed between yourself and Mr. Huckaba during those meetings?

Mr. Shapro: I object to that question, if your Honor please, on several grounds. The first ground

(Testimony of Earl R. McMillan.)
is it's too general, and secondly that if it is intended to elicit any discussions which led up to and were included in the contract of February 20th, that it would be an attempt by parol to vary the terms of a written instrument and those discussions would be merged in the instrument.

Mr. Crosby: I feel it is perfectly proper for me to—I should limit it, of course, to any discussions in connection with the purchase and sale of this equipment. I felt that was naturally [133] understood, but I would rephrase the question if your Honor so desires. I don't think the witness——

The Court: What have you to say about the other objection, the other part of the objection?

Mr. Crosby: All of these conversations, your Honor, go to proving our Affirmative Defenses 1, 2, 3 and 4.

The Court: What are 2 and 3?

Mr. Crosby: 2, your Honor—no, I'm sorry, I'll withdraw that as to 2, but as to——

The Court: 1 and 4?

Mr. Crosby: Yes. I will withdraw the question as to 2 and 3 and limit it to application to Affirmative Defenses 1 and 4.

The Court: As so limited the objection is overruled.

Q. (By Mr. Crosby): Would you like to have the question reread, Mr. McMillan?

A. Yes, please.

The Court: Read it, Mr. Reporter.

(Testimony of Earl R. McMillan.)

(The reporter read the last question as follows:

("Q. What if anything was discussed between yourself and Mr. Huckaba during those meetings?") [134]

A. Those discussions covered every phase of the matter of the equipment that he was proposing to furnish and that I, as managr of the Bellingham Coal Mines Company, was trying to decide as being the right equipment for the job. We discussed many of the technical phases, Mr. Huckaba was a technical man and I am also a technical man, and we discussed all phases of the—the technical phases of the problem and the economics of the operation. We also discussed the setup of the Bellingham Coal Mines Company and how it was to be operated, the market for the coal; and as I say, we discussed many things during those several meetings and visits we had with each other.

Mr. Shapro: Your Honor, I move to strike the answer of the witness as not responsive to the question as limited.

The Court: The motion is granted. It is stricken.

The Witness: May I continue?

The Court: If you wish to find out anything else this witness said or that Mr. Huckaba said, you should ask him a question to that effect. This is direct examination.

Q. (By Mr. Crosby): Mr. McMillan, during these meetings after January 16, 1952, and prior

(Testimony of Earl R. McMillan.)

to February 20, 1952, [135] what discussions did you and Mr. Huckaba have relative to the furnishing of equipment to be placed in the Bellingham Coal Mine Company?

The Court: Other than what you have already stated, if you did have any other conversations. Do not repeat what you have already said.

A. Yes, sir. I did not mention, as I recall, that we agreed——

Mr. Shapro: That is a conclusion, your Honor, not a conversation.

The Court: You will have to say what he said and what you said. That statement that you were about to make indicates the necessity of your putting your answer in the form suggested by the Court. State what he said and what you said.

A. Your Honor, I cannot recall the exact words of what he said or what I said, because it involved many conversations.

The Court: If you can state the substance of what he said and what you said, that is acceptable, provided it is something that you haven't already testified to.

A. Yes, sir. The thing I have in mind to say is that Mr. Huckaba said that he didn't think that the size of the equipment specified under the [136] first proposal was sufficiently large or of high enough capacity to handle the tonnage of coal that we might want to handle in the operation of the Bellingham Coal Mines Company, in the operation of the Bellingham Coal Mine, and I agreed, and on

(Testimony of Earl R. McMillan.)

that basis we changed, or at my request, rather, Mr. Huckaba submitted a—you might call it an amended or another quotation.

Q. (By Mr. Crosby): Is that quotation Plaintiff's Exhibit No. 1?

Mr. Shapro: Your Honor, before that question is answered or ruled upon may I make a motion that the last answer of the witness to the preceding question be stricken upon the ground it is not responsive to the question with the limited purposes for which it was allowed?

The Court: Do you wish to respond?

Mr. Crosby: I think that it deals with the general subject of furnishing equipment for the Bellingham Coal Mines Company.

The Court: Wasn't that gone into previously in a general way?

Mr. Crosby: The previous testimony, your Honor, dealt with his conversations prior to January 16, 1952, when Exhibit A-11 was submitted. The present question runs to conversations after that time but [137] before the submission of Plaintiff's Exhibit No. 1.

Mr. Shapro: Your Honor, but you only limited that subject matter——

The Court: Just a minute. Did you so understand, Mr. McMillan? Did you understand that what you were last relating of conversations with him related to occurrences as of the time mentioned by Mr. Crosby?

A. Yes, sir.

(Testimony of Earl R. McMillan.)

Mr. Shapro: Our point, your Honor, is that it was offered and received solely for the purpose of showing the Affirmative Defenses 1 and 4, the question of no consideration and the question of the alleged suretyship. The subject matter of this witness' answer shows clearly that there was a change at his request in the quotation of February 16th, which is A-11, that changed it into the amended quotation which is the contract, Plaintiff's Exhibit No. 1. Therefore it doesn't show anything so far as we can see with respect to either consideration or suretyship.

The Court: The objection is overruled.

Mr. Crosby: May we have handed to the witness Plaintiff's Exhibit No. 2?

The Court: That will be done.

(The Bailiff did as requested.)

Q. (By Mr. Crosby): Subsequent to Plaintiff's Exhibit No. 1 [138] being given to Mr. Huckaba what if anything did you do in connection with Plaintiff's Exhibit No. 1?

Mr. Koch: May I have that question repeated?

The Court: Read it, Mr. Reporter. I again suggest that I would like for one Counsel to conduct the examination. Proceed.

(The reporter read the last question as follows:

("Q. Subsequent to Plaintiff's Exhibit No. 1 being given to Mr. Huckaba what if anything

(Testimony of Earl R. McMillan.)

did you do in connection with Plaintiff's Exhibit No. 1?")

A. I do not have Plaintiff's Exhibit No. 1.

The Court: Let him see it.

(Plaintiff's Exhibit No. 1 was handed to the witness.)

Q. (By Mr. Crosby): Do you have in mind the question, Mr. McMillan?

A. Yes, sir. Well, on February 25th, which was five days after the date shown on Exhibit No. 1, I wrote a letter to Western Machinery Company, the Spokane Office, attention Mr. Huckaba, which is shown marked as Plaintiff's Exhibit No. 2.

Q. Subsequent to your writing the letter of February 25, [139] 1952, did you have any other personal contact with representatives of the Western Machinery Company? A. Yes, sir.

Q. When, if you recall, was the next time you had any contact with their representatives?

A. Well, I had frequent contacts with Mr. Huckaba during the period of installation of the equipment, which was sometime subsequent to February 20, 1952. It extended for several months, until the latter part of August of 1952. Also during that period there was—I had a contact with at least one other member of the Western Machinery Company that visited the mine at Bellingham. As I recall, his name was Mr. Seaton. And later, that is in the latter part of I'd say August, or during

(Testimony of Earl R. McMillan.)

August, the Western Machinery Company sent a man, a factory man, to supervise the installation, and his name was—if I remember correctly it was Moses.

Mr. Crosby: I would like to have marked for identification——

The Clerk: Defendant's Exhibit No. A-14.

(A letter dated August 20, 1952, from Earl R. McMillan to Western Machinery Co., was marked Defendant's Exhibit No. A-14 for identification.)

Q. (By Mr. Crosby): Mr. McMillan, referring to what has [140] been marked for identification as Defendant's Exhibit No. A-14, would you please state what that is?

A. This is a letter dated August 29, 1952, I wrote and gave to Western Machinery Company at their request certifying on behalf of Bellingham Coal Mines Company as to the installation and performance of the equipment.

Q. You stated at their request. Do you recall what party made the request?

A. Mr. Moses, the man who as I mentioned was the factory representative on the job. At the conclusion of the trial runs he asked me specifically to give him this letter which he required or was required of him by his company.

Mr. Crosby: I would like to offer A-14 in evidence.

Mr. Shapro: No objection, your Honor.

(Testimony of Earl R. McMillan.)

The Court: Admitted.

(Defendant's Exhibit No. A-14 for identification was admitted in evidence.)

Mr. Crosby: May the witness please be handed Defendant's Exhibit No. A-5?

The Court: That will be done.

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. McMillan, referring to the second paragraph of Defendant's A-5, would you first read the [141] first sentence of that Paragraph No. 2? A. Yes, sir.

Q. Would you please read it out loud?

A. Oh, pardon me. "Mr. McMillan advises us over the phone of your request that we give a conditional bill of sale on the remaining balance."

Q. Would you please state who of Western Machinery Company made that request and the time and how the request was made?

A. My recollection is that the man's name was Mr. Goering, G-o-e-r-i-n-g, as I recall, of the Western Machinery Company office in San Francisco telephoned me on or about July 30, 1952, and asked me if I thought that the Bellingham Coal Mines Company would be willing to give Western Machinery a conditional bill of sale on the purchase of this equipment, and my reply was that I could not answer the question but that I would refer it to Mr. Ramage, the President of Bellingham Coal Mines Company. His office is in Spokane, inciden-

(Testimony of Earl R. McMillan.)

tally, but I told Mr. Goering I would refer the matter to Mr. Ramage by telephone and he no doubt would hear directly from Mr. Ramage.

Mr. Crosby: May the witness be handed Exhibits A-6 and A-9?

The Court: That will be done. [142]

(The bailiff did as requested.)

Mr. Crosby: For the record may I ascertain if those two have been admitted in evidence as yet?

The Court: They have not been admitted.

Mr. Crosby: Pardon?

The Court: They have not been admitted.

Mr. Crosby: Might I inquire if A-5 has been admitted in evidence?

The Court: It has.

Mr. Shapro: Yes, it has.

Q. (By Mr. Crosby): Mr. McMillan, subsequent to your telephone conversation with Mr. Goering did you receive any communications or have any meetings or conversations with representatives of Western Machinery Company relative to the equipment which was furnished the Bellingham Coal Mines Company? A. Yes, sir.

Q. When was that? What were they, first, meetings or—— A. Telephone calls.

Q. From whom?

A. Mr. Goering in San Francisco.

Q. In what connection?

A. In connection with the possibility of getting

(Testimony of Earl R. McMillan.)

payment from the Bellingham Coal Mines Company on their account.

Q. Did you have any further conversations with their [143] representatives?

A. Well, the telephone call to which I last referred was on or about August 10th, about ten days after the previous call regarding the possibility of getting a conditional bill of sale, and in this telephone conversation of August 10th or thereabouts I assured Mr. Goering that Bellingham Coal Mines Company was making every effort to arrange for a substantial payment on the account and that I could assure him that he would receive a payment within the next few days. I couldn't say how much. He pressed me for an estimate of the amount and I estimated anywhere from $15,000 to $25,000 to the best of my knowledge, and I told him at the conclusion of the conversation that I would again telephone Mr. Ramage, the President of the company, in Spokane and inform him of my conversation that day with him, Mr. Goering, and would follow through on it.

Q. Subsequent to that time did you have any meetings with anyone connected with Western Machinery Company?

A. Well, subsequent to that time, yes, my meeting with Mr. Moses in Bellingham.

Q. Well, aside from those that you have already referred to, Mr. McMillan.

A. Aside from those I have referred to I had no

(Testimony of Earl R. McMillan.)
meetings that I recall until the latter part of February or [144] early March of 1953.

Q. And what meeting was that and where was it?

A. That meeting was in San Francisco in Mr. Barshell's office.

Q. What was the subject of that meeting?

A. I called at the office of the Western Machinery Company in San Francisco at the request of the Bellingham Coal Mines Company to inform them as to the condition of the Bellingham Coal Mines Company and the progress we were making in trying to solve the financial difficulties which the company was heading into about that time.

Q. What if anything did Mr. Barshell say at that meeting in connection with the payment by Bellingham Coal Mine Company?

A. I'm sorry, I didn't hear the first part. Would you read it back to me?

(The reporter read the last question.)

A. Well, the substance of his comment was that they were, that is the Western Machinery Company was becoming very much concerned about the account, and while we were discussing the subject, as I recall, Mr. Shapro came in. I don't know whether he just happened to drop in or whether Mr. Barshell——

Q. The question, Mr. McMillan, dealt only with Mr. Barshell's statements. [145]

A. Beg pardon?

(Testimony of Earl R. McMillan.)

Q. The question dealt only with Mr. Barshell's statements.

A. Well, I repeated to Mr. Barshell what I had told—excuse me, strike that. I repeated to Mr. Shapro what I had said to Mr. Barshell.

The Court: He tried to let you know that he was not interested in that at this moment. He is only interested in what Mr. Barshell said, if anything.

Q. (By Mr. Crosby): Now, what was the nature of the account that Bellingham Coal Mine Company had with Western Machinery Company?

Mr. Shapro: I object to that question, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

The Court: That objection is sustained. Again I remind Counsel that it would be proper to ask the witness to state what was said or the substance of what was said by the person who was supposed to be speaking, if he has not already done that.

Q. (By Mr. Crosby): Mr. McMillan, did the Bellingham Coal Mine Company give Western Machinery Company anything in writing evidencing the indebtedness for the machinery which was furnished to the Bellingham Coal Mine Company and installed at Bellingham, Washington?

Mr. Shapro: To which question we object, [146] if your Honor please, upon the ground that it is incompetent, irrelevant and immaterial and no foundation is laid, and it is no part of any af-

(Testimony of Earl R. McMillan.)
firmative defense here in connection with this case. There is no action brought upon any instrument in writing in connection with a payment other than a contract and agreement which is Plaintiff's Exhibits 1 and 2.

Mr. Crosby: Your Honor, one of the affirmative defenses is No. 4, that—No. 3, that the Western Machinery Company took a promissory note from Bellingham Coal Mines Company, and that the promissory note resulted in a novation.

Mr. Shapro: May I be heard on that subject, your Honor?

The Court: Yes, you may.

Mr. Shapro: Your Honor, it is true that Counsel has pleaded an alleged novation by the taking of a promissory note by the plaintiff from the Bellingham Coal Mines Company. However, and the purpose of this objection, the foundation of it, your Honor, is that in order to show a novation a foundation must be laid of several things to constitute a novation, no one of which has been elicited from this or any other witness; namely, among other things an agreement to make a novation, an intention of the parties to make [147] a novation and the identity of the parties to make a novation, and fourth, the consideration for a novation. None of those elements have been elicited from this or any other witness, and it is our position that prior to the receipt by this Court of any evidence on the subject of the note the basis or foundation for a novation such as the agreement, the consideration

(Testimony of Earl R. McMillan.)

and the intention of the parties must first be established.

The Court: You can't establish them all at once.

Mr. Crobsy: That's right, your Honor, it has to be done by steps.

The Court: The objection is overruled. What I would like to know is what do you call No. 1. What do you. It isn't what the Court understands. What I would like to know is what do you, Mr. Crosby, call the first affirmative defense. Will you mark the page and the line where it begins and where it ends? I am unable to discover any numbering and I have to number something here. On what page does the first affirmative defense begin? What is your contention?

Mr. Crobsy: Page No. 1 on Line 26.

The Court: Is that the first affirmative [148] defense?

Mr. Crosby: Our first affirmative defense to the first count, of the amended answer, your Honor.

The Court: Then where does the second affirmative defense start?

Mr. Crosby: The second affirmative defense starts on Line 3 of Page 2, your Honor. It is my understanding that I had used lined paper. I——

The Court: You have. That is the second affirmative defense, is it?

Mr. Crosby: The second affirmative defense, yes, your Honor.

The Court: I am working "2" in the margin opposite that Line 3. I have marked "1" with a

(Testimony of Earl R. McMillan.)

lead pencil in the margin of your amended answer filed April 12, 1956.

Mr. Crosby: Yes, your Honor.

The Court: I have put a figure 1 in the margin on the left-hand side of the page opposite Line 26 on the first sheet. Where does No. 3 begin?

Mr. Crosby: No. 3 starts with Line 10 on Page 2, your Honor.

The Court: That is No. 3, is it?

Mr. Crosby: That is No. 3.

The Court: I am marking that "No. 3."

Mr. Crosby: No. 4, your Honor—— [149]

The Court: Where does that start?

Mr. Crosby: That starts with Line 19 on Page 2.

The Court: In other words, it is paragraph numbered four on that page?

Mr. Crosby: It is Paragraph No. 4, yes, sir.

The Court: That is No. 4 affirmative defense, is it?

Mr. Crosby: Yes, your Honor. Of course, I was referring only to the first count.

The Court: I don't care what you were referring to respecting counts. You have referred in the record here today to an offer of proof with respect to Affirmative Defenses 1 and 4. I am trying to identify them.

Mr. Crosby: Yes, your Honor.

The Court: Are the affirmative defenses that you made an offer to with respect to certain exhibits these 1 and 4 that you have just now mentioned?

Mr. Crosby: Then going further to Page 3——

(Testimony of Earl R. McMillan.)

The Court: For what, which number on Page 3?

Mr. Crosby: I'm sorry, your Honor. Possibly I didn't make it——

The Court: You certainly haven't for me, and I don't know how you could if you claim that 1 and 4 [150] are stated in part at some other places other than these.

Mr. Crosby: Your Honor, plaintiff has two counts, and the same——

The Court: Do they assert the same affirmative defense on each count?

Mr. Crosby: That is right, your Honor.

The Court: All right. Where does Count 2 begin and where does the Affirmative Defense No. 1 begin as to the Count 2?

Mr. Crosby: On Page 3, Line 12.

The Court: On Page 3, Line what?

Mr. Crosby: 12, numbered Paragraph 1.

The Court: Page 3, Line 12?

Mr. Crosby: 12, yes, your Honor.

The Court: What if anything do the words beginning on Line 27 near the bottom of Page 2 down to and including the line which you last mentioned, Line 12 on Page 3, concern, if they concern anything? Do they constitute another affirmative defense or do they constitute anything in the way of an answer?

Mr. Crosby: They are an answer to plaintiff's second count.

The Court: Just of denial, is that what it amounts to? [151]

(Testimony of Earl R. McMillan.)

Mr. Crosby: That is right, your Honor.

The Court: The first affirmative defense, which is the same kind of a defense, is it, as to Count 2 which the corresponding number was to Count 1, is that right?

Mr. Crosby: That's right, your Honor.

The Court: And that is Line what?

Mr. Crosby: Line 12 on Page 3.

The Court: I am marking a "1" in the margin opposite Line 12. Where is the second affirmative defense?

Mr. Crosby: Line 19 on Page 3.

The Court: Very well, that will be marked "2" opposite the 19th line on Page 3. Where is the third affirmative defense?

Mr. Crosby: Line 26 on Page 3.

The Court: That will be marked with the figure 3 opposite Line 26. Where is No. 4?

Mr. Crosby: Line 4 on Page 4.

The Court: All right. At the top of that Page 4 above Line 1 in the margin I am putting "Affirmative Defenses," those two words, and then this "4" down below will appear under that, and on Page 3 above Lines 9 and 10 I am putting the words "Affirmative Defenses" in the left-hand margin above the figure 1 [152] and at or about Lines 9 and 10. And then at or about Line 23 I am putting the words "Affirmative Defenses," that is on Page 1. Then on Page 2 at the top of the left-hand margin above the line numbered 1 I am putting the words "Affirmative Defenses." Now at

(Testimony of Earl R. McMillan.)
least I can understand that. I don't suppose anyone else can, but I can. I certainly did not understand the situation before that was done. There are two counts and you have the same set of affirmative defenses stated as to each, is that right?

Mr. Crosby: That is right, your Honor.

The Court: As to which one of these counts do you wish the exhibits which have been admitted for a limited purpose as to Counts 1 and 4 to be applicable?

Mr. Crosby: The affirmative defenses to both counts, your Honor.

The Court: In other words, Affirmative Defenses numbered 1 and 4 in respect to the affirmative defenses of both counts, you wish those admitted, and the Court will let the record at this time show that that is the intention of the Court.

Mr. Crosby: Thank you very much, your Honor.

The Court: You may proceed by further interrogation of this witness. If you have a question before him, restate it. [153]

Q. (By Mr. Crosby): Mr. McMillan, did the Bellingham Coal Mine Company give to Western Machinery Company any written agreement covering the indebtedness for the equipment which was installed in the Bellingham coal mine?

The Court: Answer yes or no.

Mr. Shapro: I'm going to object to that question, if your Honor please, on the ground it calls for the opinion and conclusion of the witness.

(Testimony of Earl R. McMillan.)

The Court: The objection is overruled. Answer yes or no.

A. Yes.

Q. (By Mr. Crosby): Referring to Defendant's Exhibit No. A-6, would you please state what that A-6 is?

The Court: For identification. It has not been admitted.

Mr. Crosby: Yes.

A. It is a promissory note dated August 20, 1952, in the amount of $56,038.17.

The Court: That is a part of the contents. It is not in evidence yet.

Q. (By Mr. Crosby): What signatures appear on the note? On that exhibit, pardon me.

A. James S. Ramage, President, Bellingham Coal Mines Company, and Herbert Little, Secretary, Bellingham [154] Coal Mines Company.

Q. Are you personally familiar with the signatures of Mr. Ramage and Mr. Little?

A. Yes, sir.

Q. Please state if their signatures appear on that Exhibit A-6? A. Yes, sir.

Q. What is the nature of A-6?

A. It is a promissory note dated August 20, 1952.

The Court: That is sufficient.

Q. (By Mr. Crosby): That is sufficient. Who are the parties on the note?

A. The note is payable to the Western Machinery Company.

Q. Now, did you ever have any discussions with

(Testimony of Earl R. McMillan.)
representatives of Western Machinery Company relative to the note which is Defendant's A-6?

Mr. Shapro: I object to that question, if your Honor please, upon the ground no proper foundation has been laid. The note is not in evidence.

The Court: The objection is overruled. Answer yes or no.

The Witness: Would you read the question, please?

(The reporter read the last question.)

A. No, sir. [155]

The Court: At this point I would like to inquire how much more time Counsel on both sides expect it will take to finish the trial so far as taking testimony is concerned.

Mr. Crosby: I believe that the balance of the defendant's case, the testimony will take about a half a day.

The Court: Will there be any rebuttal?

Mr. Shapro: Yes, there will be rebuttal, and if the balance of defendant's case takes a half a day our rebuttal will not take over a half a day.

The Court: We only have one other day this week. I assume Counsel will wish to argue the case.

Mr. Shapro: Yes, your Honor.

The Court: And we will expect to finish it by about this time. So that means that we will have to begin early in the morning. We will continue for a little while longer now. I wish Mr. Crosby could

(Testimony of Earl R. McMillan.)
speed up his examination, especially relating to exhibits. You may proceed.

Q. (By Mr. Crosby): Mr. McMillan, did the Western Machinery Company ever make any demand upon the Northwestern Improvement Company to give a promissory note covering the indebtedness for the machinery placed with the Bellingham Coal Mine Company? [156]

Mr. Shapro: I object to that, if your Honor please, on the ground the question is leading and suggestive.

The Court: The objection is overruled.

A. No, sir.

Mr. Shapro: Your Honor, I don't want to delay, but I would like to have that question read.

The Court: Read the question.

Mr. Shapro: Please, your Honor.

(The reporter read the last question as follows:

("Q. Mr. McMillan, did the Western Machinery Company ever make any demand upon the Northwestern Improvement Company to give a promissory note covering the indebtedness for the machinery placed with the Bellingham Coal Mine Company?")

The Court: You may proceed.

Q. (By Mr. Crosby): Relative to your conversations with Mr. Barshell in San Francisco prior to the time Mr. Shapro came into the office, was

(Testimony of Earl R. McMillan.)

there any discussion with Mr. Barshell relative to——

The Court: Why don't you ask him what [157] if anything was said and get him to say everything that was said and done and then let it go at that?

Q. (By Mr. Crosby): What, if anything, was said in connection with Defendant's Exhibit A-6?

Mr. Shapro: I object to the form of the question, if your Honor please, upon the ground it is leading and suggestive.

The Court: The objection is overruled.

A. Mr. Shapro said to me——

Q. (By Mr. Crosby): Mr. McMillan, before Mr. Shapro came in. A. Pardon me?

Q. What did Mr. Barshell say?

The Court: If anything he did say in addition to what you have already testified to earlier.

A. Nothing further.

Q. (By Mr. Crosby): Now, at that same time was there anybody else in Mr. Barshell's office with whom you discussed the payment for the machinery which was installed in the Bellingham Coal Mine Company? A. Mr. Shapro came in.

Q. Yes, and what, if anything, did Mr. Shapro say at that time?

The Court: You should first find out who was present and when it was as nearly as he can [158] fix it.

Mr. Crosby: Thank you, your Honor.

Q. (By Mr. Crosby): Who was present, Mr. McMillan, at that meeting?

(Testimony of Earl R. McMillan.)

A. Mr. Barshell and Mr. Shapro.

Q. And——

The Court: Who else, if anyone?

A. No one else.

The Court: Were you present?

A. I was, sir.

The Court: Very well. When was it approximately with reference to the other conversation you last were asked about?

A. Your Honor, I had only one conversation.

The Court: What day was it, then, if you remember, or month?

A. Approximately—it was some time during the first week in March, 1953.

Q. (By Mr. Crosby): Just yourself and Mr. Barshell and Mr. Shapro were present?

A. That's correct.

Q. What, if anything, did Mr. Shapro say relative to——

The Court: Strike the "relative." And what did you say, if anything, regarding any subject there at that time?

A. Briefly and in substance Mr. Shapro said, "We think [159] the Northwestern Improvement Company has some liability on this account." My reply was I personally did not think there was but I was not a lawyer or I did not care to go into any legal discussion of the matter, and Mr. Shapro graciously agreed to that, that he wouldn't question me any further about it or discuss the matter further.

(Testimony of Earl R. McMillan.)

Q. (By Mr. Crosby): After the giving of the promissory note by Bellingham Coal Mine Company, after that time and before Mr. Shapro's statement that you just referred to, did anybody of the Western Machinery Company make any contention to Northwestern Improvement Company that they were responsible for the equipment that was delivered to the Bellingham Coal Mine?

A. Not to my knowledge.

The Court: I think we will stop here. Court is adjourned until tomorrow morning at 10:00 o'clock.

(Thereupon, at 4:15 o'clock p.m., a recess herein was taken until 10:00 o'clock a.m., Friday, June 15, 1956.) [160]

Friday, June 15, 1956—10:00 o'Clock A.M.

(All parties present as before.)

The Court: You may proceed in the case on trial.

Mr. Crosby: Mr. McMillan, please resume the stand.

The Court: Mr. McMillan will resume the stand for further interrogation.

EARL R. McMILLAN

resumed the stand.

Mr. Crosby: I have three documents which I would like to have marked.

The Clerk: Defendant's Exhibits A-15, A-16 and A-17.

(Testimony of Earl R. McMillan.)

The Court: In two instances I believe there is more than one paper suggested as an exhibit and I wish to know first before approving the marking of them all as one exhibit in any situation that Counsel are agreed that if one of the component papers is admissible, all are, and that as to none of such component papers is the matter of admissibility affected by different facts to the objection of defendant.

Mr. Crosby: Your Honor, I discussed that with Mr. Shapro and it is agreeable with him that [161] they be marked.

The Court: Then the clerk will mark them as requested by Counsel.

(Voucher No. 1060, dated Nov. 10, 1953, of Western Machinery Co., was marked Defendant's Exhibit No. A-15 for identification.)

(A uniform straight bill of lading, dated 5/20/52, and packing list of Western Machinery Company were marked Defendant's Exhibit No. A-16 for identification.)

(Bills of lading and packing lists of Allis-Chalmers Manufacturing Co. and a bill of lading of Cutler-Hammer, Inc., and packing list, were marked Defendant's Exhibit No. A-17 for identification.)

Q. (By Mr. Crosby): Mr. McMillan, would you please refer to Defendant's exhibit that is marked for identification as A-15 and explain what that is?

(Testimony of Earl R. McMillan.)

A. This is a voucher showing the payment by check of the Bellingham Coal Mines Company to Western Machinery Company, under date of November 10, 1953.

The Court: Is it or is it not what was formerly known as a check stub which the drawer of the check usually kept in his office or files?

Mr. Crosby: Your Honor, to expedite matters, I believe that—— [162]

Mr. Shapro: I will so stipulate, your Honor.

The Court: I asked the witness.

Mr. Shapro: Sorry.

The Court: You say it is stipulated that that is what it is?

Mr. Shapro: That's what it is, yes, your Honor.

Mr. Crosby: Yes, your Honor.

The Court: Very well.

Mr. Crosby: Could the witness please be handed Defendant's A-4, which is a group of checks?

(The bailiff did as requested.)

Q. (By Mr. Crosby): Mr. McMillan, would you please refer to Check No. 1017 in Defendant's A-4 and would you please tell the Court whether or not the check stub is the check stub for the Check No. 1017? A. Yes, sir.

The Court: Does 1017 have a clerk's identifying mark? If so, will you let it be referred to by that mark?

Mr. Crosby: The group of checks, your Honor, is marked——

(Testimony of Earl R. McMillan.)

The Court: No, you referred to Defendant's A-4 a minute ago and asked him to look at that.

Mr. Crosby: Yes, your Honor. [163]

The Court: And now you have referred to something as a check.

Mr. Crosby: The exhibit is a group of checks.

The Court: What exhibit are you talking about now?

Mr. Crosby: Defendant's Exhibit A-4, your Honor, is a——

The Court: Those are paid checks, apparently.

Mr. Crosby: Paid checks.

The Court: All right, and you asked him to look at one of them?

Mr. Crosby: At one of them.

The Court: You should refer to one of them as the exhibit by number, Defendant's Exhibit A-4, Mr. Crosby, so that the record identification of the thing you are talking about will be shown in your question.

Mr. Crosby: I'm sorry, I will restate the question.

The Court: In order for you to be able to tell in the future, if you ever want to look at the record again, what you are talking about and so that any other person might be able to tell it. That is the reason for a suggestion of this sort. Proceed.

Q. (By Mr. Crosby): Mr. McMillan, in Defendant's Exhibit [164] No. A-4 would you please refer to the check in that exhibit designated Check

(Testimony of Earl R. McMillan.)

No. 1017 and tell the Court whether or not that check was the same check issued in connection with the stub which is marked as Exhibit A-15?

A. That is correct.

Mr. Crosby: Might Exhibit A-15 be admitted into evidence, your Honor?

Mr. Shapro: Your Honor, I have no objection to the introduction in evidence of A-15 provided it is understood, and Counsel has indicated he would so stipulate, that the data on the stub was not endorsed upon or shown upon the face of the check itself when it was transmitted to plaintiff.

Mr. Crosby: I will so stipulate.

The Court: Defendant's Exhibit A-15 is now admitted.

(Defendant's Exhibit No. A-15 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Referring to Defendant's Exhibits A-16 and A-17, Mr. McMillan, would you please explain what those exhibits are?

A. A-16 is a railroad bill of lading and a packing list covering——

The Court: The last, and what? [165]

A. A packing list, covering partial shipment of coal washing plant by Western Machinery Company to Bellingham Coal Mines Company at Bellingham.

Q. (By Mr. Crosby): And A-17 is a similar bill of lading, Mr. McMillan?

Mr. Shapro: Your Honor, I'm going to object to Counsel's leading the witness. On that there is a difference.

(Testimony of Earl R. McMillan.)

The Court: Objection sustained.

Mr. Crosby: I'm sorry, I thought we were agreed.

The Court: It would be so easy for one of the experience of Mr. Crosby to ask a question that is unobjectionable in a situation like this. You may proceed.

Mr. Crosby: I'm sorry, I misunderstood.

The Court: Proceed.

A. A-17——

Q. (By Mr. Crosby): Would you please explain what A-17 is, Mr. McMillan?

A. Defendant's Exhibit A-17 is a railroad bill of lading covering a partial shipment of a coal washing plant from Allis-Chalmers Manufacturing Company's plant in Norwood, Ohio, to Western Machinery Company and Bellingham Coal Company at Bellingham, Washington. [166] Also a packing list describing contents of shipment. Also another bill of lading covering partial shipment of coal washing plant from Allis-Chalmers' plant in Cleveland, Ohio, consigned to Western Machinery Company and Bellingham Coal Mines Company at Bellingham, Washington, together with packing list describing contents of shipment. Also bill of lading covering partial shipment of coal washing plant from Cutler-Hammer, Inc., of San Francisco, California, to Bellingham Coal Mines Company, together with packing list describing contents of shipment.

(Testimony of Earl R. McMillan.)

The Court: Hammer-Cutler, is that what you said?

A. Cutler-Hammer, Inc., San Francisco.

The Court: You may proceed.

Q. (By Mr. Crosby): As to all of the packing lists in Exhibit No. A-17, what equipment do those lists cover, Mr. McMillan?

Mr. Shapro: I will stipulate, Counsel, that they cover a part of the coal washing plant involved in this case.

Mr. Crosby: Thank you, Counsel. May the witness please be handed Exhibit No. 1. Your Honor, may Exhibits——

The Court: Is it Plaintiff's 1, Mr. Crosby? [167]

Mr. Crosby: Plaintiff's 1, your Honor.

(Plaintiff's Exhibit No. 1 was handed to the witness.)

Mr. Crosby: Your Honor, may Defendant's Exhibits A-15, A-16 and A-17 be admitted in evidence?

Mr. Shapro: I think A-15 is already in, your Honor.

The Court: That is true.

Mr. Shapro: So far as Exhibits A-16 and A-17 are concerned, your Honor, we object to their admission in evidence upon several grounds. With respect to Exhibit A-16, which in substance is a bill of lading of a partial shipment of a part of this coal washing plant by Western Machinery Company of San Francisco addressed and consigned to Bellingham Coal Mines Company, we submit that it is

(Testimony of Earl R. McMillan.)

incompetent, irrelevant and immaterial because it does not tend to prove or disprove any issue in this case, having in mind, your Honor, that Plaintiff's Exhibit 1 and Plaintiff's Exhibit 2, namely the so-called what we call the contract here, the order, directs us, the defendant being the buyer, directs us to ship and deliver the equipment in question to Bellingham Coal Mines Company. Therefore, we submit that a bill of lading from us of part of the shipment directed to Bellingham Coal Mines Company will have no [168] bearing or materiality upon the issue in this case as to whether or not Northwestern Improvement Company is liable. Exhibit A-17——

The Court: Speak what the evidence indicates in your mind was the origin and so forth of that exhibit.

Mr. Shapro: A-17, your Honor?

The Court: According to the evidence before the Court.

Mr. Shapro: Yes. According to the evidence so far as Exhibit A-17 is concerned, it represents three shipments which I concede, have conceded, includes a part of the coal washing plant involved which we sold, so we claim, to the defendant.

The Court: Are the shipments mentioned as the two from the Ohio plants, two different plants, the Allis-Chalmers and one from Cutler-Hammer?

Mr. Shapro: Yes, your Honor.

The Court: That is A-17, is it?

Mr. Shapro: That is A-17, yes, your Honor. That

(Testimony of Earl R. McMillan.)

consists of two bills of lading, one from Allis-Chalmers and one from Cutler-Hammer. We make the further objection as to Exhibit A-17 that it is hearsay as to us and no proper foundation has been laid in that we cannot be bound without some foundation by the directions given to the carrier as to the named [169] consignee without first showing that it was ordered by us that way, and also, your Honor, the two of the three bills of lading, namely the first two from Allis-Chalmers, are actually consigned to Western Machinery Company and Bellingham Coal Mines Company, and therefore we submit their admission in evidence would not tend to prove or disprove any issue in this case, because a joint consignment to the seller passes no title or conveys no information.

The Court: I would like to know what you claim the evidence shows with respect to the difference, as to paper, between Defendant's Exhibit A-16 and Defendant's Exhibit A-17.

Mr. Shapro: Is your Honor addressing the question to me, sir?

The Court: Yes, I am.

Mr. Shapro: The difference, your Honor, is that A-16 is a direct shipment by us; we are the consignor. The other three we are not the consigner, either Allis-Chalmers or Cutler-Hammer are the consignors. In other words, your Honor, one is definitely chargeable to us if it is material. The other three we submit, even if material, would not be

(Testimony of Earl R. McMillan.)

chargeable to us and would be objectionable as hearsay.

The Court: I understand that among other [170] things the purpose of the offer is to show some of the allegedly material conduct of the parties subsequent to the date and execution of the contract. It isn't easy for the Court to see how that would be objectionable on the ground of hearsay, since it is papers handled by one or the other of the two parties, and if not by both of them after the execution of the contract and relate to other mentioned acts, acts which are mentioned in the documents themselves, such as actions effectuating the shipments.

Mr. Shapro: I agree with your Honor's observations there with the single exception, if I may say so, your Honor, that the direction in the bills of lading of consignment to Bellingham Coal Mines Company are consistent with the order, they are not inconsistent with the order.

The Court: That is not for the Court to decide as to admissibility, I believe. That is more a matter of probative effect. The objections are overruled. Defendant's Exhibit A-16 is admitted. Defendant's Exhibit A-17 is admitted.

(Defendant's Exhibits Nos. A-16 and A-17 for identification were admitted in evidence.)

The Court: I would like for Mr. Crosby to [171] say what is Defendant's Exhibit A-16, giving it a one word name or two word name, if you can, reflecting the nature of its contents, and then I would

(Testimony of Earl R. McMillan.)
like to ask you the same question with respect to A-17, according to what the evidence shows. I would like to have a clear-cut idea in the way of a name for each, to be able in the future to help me distinguish between the two, if you know of any information like that that reflects the statement of this witness.

Mr. Crosby: Your Honor, A-16 is Western Machinery Company's bill of lading.

The Court: Did the witness say or did he not say it was a railroad bill of lading and packing list concerning this machinery shipment?

Mr. Crosby: Yes, your Honor.

The Court: All right. Now, what did the witness say as to what the things were in Defendant's Exhibit A-17, if he said anything different from what he said about what constituted A-16?

Mr. Crosby: Your Honor, they are the same. The only difference is that the bills of lading were——

The Court: Bills of lading—do you mean A-16? Please refer to the exhibit number.

Mr. Crosby: A-16, your Honor, is a bill of lading and packing list covering a portion of the [172] equipment forwarded to Bellingham Coal Mines Company. However, the bill of lading is Western Machinery Company's bill of lading. A——

The Court: Were your last remarks about A-16?

Mr. Crosby: A-16, your Honor.

The Court: Very well.

(Testimony of Earl R. McMillan.)

Mr. Crosby: As to A-17, your Honor, it is three bills of lading together with packing lists.

The Court: In other words, A-17 comprises bills of lading also as well as A-16, is that right?

Mr. Crosby: That is right, your Honor.

The Court: Very well, that is all I want to know. Proceed.

Q. (By Mr. Crosby): Mr. McMillan, please refer to Plaintiff's Exhibit No. 1. Would you please explain the reason for the change of name at the head of the quotation?

The Court: Will you read that question, Mr. Reporter?

(The reporter read the last question.)

Q. (By Mr. Crosby): At the top of the quotation, Mr. McMillan. A. I understand, yes.

The Court: If he knows.

Q. (By Mr. Crosby): If you know, Mr. McMillan. [173] A. Yes, sir, I know.

Q. Under what circumstances was the change made, if you know, Mr. McMillan?

A. Well, at the time this order was placed with Mr. Huckaba of Western Machinery Company, Mr. Huckaba stated to me in substance that because of the fact that Bellingham Coal Mines Company——

The Court: He has already said that before, "that because."

Mr. Shapro: I don't think so, your Honor.

The Court: Pardon?

(Testimony of Earl R. McMillan.)

Mr. Shapro: With due respect, I don't think he has, your Honor. I'm sorry.

The Court: Proceed.

A. ——because of the fact that the Bellingham Coal Mines Company was a newly organized company and unknown to Western Machinery Company, that it would therefore probably result, that is it would probably mean that his company office in San Francisco would raise some question as to the credit ability of the Bellingham Coal Mines Company and that it would expedite processing of the order and delivery of the equipment if the name of Northwestern Improvement Company were substituted in place of Bellingham Coal Mines Company on the order and inasmuch as time was the essence of the matter at [174] that time, getting the equipment ordered and delivered, I agreed to comply with his request with the understanding very definitely that this equipment was being purchased for the Bellingham Coal Mines Company and that the Bellingham Coal Mines Company would pay for it.

Mr. Shapro: Your Honor, at this time may I move to strike the words and everything that follows "with the understanding that" upon the grounds that it is the conclusion of the witness and also that it is an attempt by parol to vary the terms of a written instrument.

The Court: I understood he was saying what was said. If he did not state it that way, the Court's ruling will be one way, but if he said it another way —Mr. McMillan, do not state in your own mind any

(Testimony of Earl R. McMillan.)

reasons that you had or that he had in his mind unless you thereby state the words used by him or you.

The Witness: I understand, your Honor.

The Court: Were you undertaking to speak his words or your words stated in his presence, one or the other?

The Witness: Yes, sir. I'm expressing the words as I can recall them which are in substance as I stated at the beginning the exact words exchanged between Mr. Huckaba and myself at that time. [175]

The Court: The objection is overruled.

Q. (By Mr. Crosby): Mr. McMillan, were the terms of payment discussed between yourself and Mr. Huckaba?

Mr. Shapro: At any time, or——

Q. (By Mr. Crosby): At any time.

A. No, sir.

Q. Mr. McMillan, state whether or not under any agreement with the Bellingham Coal Mines Company the Northwestern Improvement Company was to or did derive any monetary gain from the purchase of the coal washing plant from the Western Machinery Company.

Mr. Shapro: I object to the question, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

(Testimony of Earl R. McMillan.)

Mr. Shapro: Your Honor, that is one of the very issues in this case.

Mr. Crosby: I submit, your Honor, that this man stated on direct examination that he had advised Mr. Huckaba in their preliminary negotiations that the Northwestern Improvement Company was the manager of the coal mine of the Bellingham Coal Mines Company on a fixed fee basis, and this question tends to bring out what if any profit the Northwestern Improvement [176] Company might have derived or was anticipating deriving from the purchase of this equipment.

Mr. Shapro: If that is also the purpose of the question I will object upon the additional ground that it is cross-examination of Counsel's own witness.

The Court: I would like to hear the question read again, Mr. Reporter.

> (The reporter reread the question as follows:
> ("Q. Mr. McMillan, state whether or not under any agreement with the Bellingham Coal Mines Company the Northwestern Improvement Company was to or did derive any monetary gain from the purchase of the coal washing plant from the Western Machinery Company.")

The Court: I think I understand the objections and the question. The objections are overruled.

Q. (By Mr. Crosby): Would you please answer the question, Mr. McMillan? A. No, sir.

(Testimony of Earl R. McMillan.)

Q. Mr. McMillan, what is the present status of the Bellingham Coal Mines Company? [177]

A. It has been liquidated through receivership and bankruptcy proceedings.

Q. Approximately when did Bellingham Coal Mines Company go into bankruptcy?

A. Sometime during July, 1955.

Mr. Shapro: May 2nd, Counsel.

Mr. Crosby: Do you want to stipulate to that?

Mr. Shapro: Your Honor, so that there may be no confusion in the record, the bankruptcy of Bellingham Coal Mines, its petition was filed in this court as a matter of fact on May 2, 1955.

Mr. Crosby: I will so stipulate.

The Court: May 2, 1955?

Mr. Shapro: May 2, 1955, yes, your Honor.

Mr. Crosby: I have no further questions of this witness, your Honor.

The Court: You may cross-examine.

Cross-Examination

By Mr. Shapro:

Q. Mr. McMillan, how long have you been employed by Northwestern Improvement Company, approximately?

A. A little over twenty-six years.

Q. And how long have you been or occupied the position [178] of manager of Northwestern Improvement Company's coal operations?

A. Since April, 1951.

Q. In connection with the coal operations of

(Testimony of Earl R. McMillan.)

Northwestern Improvement Company in this state who is the executive officer?

A. We have no executive officer in the State of Washington.

Q. In other words, you, Mr. McMillan, as the manager of its coal operations are the highest official of Northwestern Improvement Company in the State of Washington? In connection with coal operations I'm referring to.

A. At this time, yes, sir.

Q. Was that true in 1952?

A. I think that is correct.

Q. Now, you have testified on direct examination that the Northwestern Improvement Company was operating the coal mine for Bellingham Coal Mines Company, is that right? A. Yes, sir.

Q. And that they did that on an arrangement for cost plus a fixed fee, is that right?

A. Yes, sir.

Q. As a matter of fact the cost represented all of the out of pocket expense connected with the maintenance and the operation and the control of the mining properties [179] of Bellingham Coal Mines Company, is that right?

A. I think that is correct as far as I know.

Q. And the fixed fee was twenty per cent of that figure to be added, is that right?

A. That's correct.

Q. And I think you testified——

Mr. Crosby: Pardon me. Might I have the question before that read back?

(Testimony of Earl R. McMillan.)

The Court: That will be done.

(The reporter read the question back as follows:

("Q. As a matter of fact the cost represented all of the out of pocket expense connected with the maintenance and the operation and the control of the mining properties of Bellingham Coal Mines Company, is that right?")

Mr. Crosby: Your Honor, I realize the question is passed but I would like to have the question and answer stricken as the question is indefinite in that it doesn't explain whose out of pocket costs.

The Court: The objection and request are overruled and denied.

Q. (By Mr. Shapro): And I think you testified, Mr. McMillan, [180] that there was an office of the Bellingham Coal Mines Company maintained on the 10th floor of the Smith Tower here in Seattle, is that right? A. That's right, sir.

Q. And that that was also the office of Northwestern Improvement Company?

A. Yes, sir.

Q. Did the Bellingham Coal Mines Company during the time that any part of its office was maintained in the Northwestern Improvement Company office in the Smith Tower pay any portion of the rent of that office?

The Witness: Would you read the question, please, back to me.

(Testimony of Earl R. McMillan.)

(The reporter read the last question.)

A. Not to my knowledge.

Q. (By Mr. Shapro): As a matter of fact the executive office of Bellingham Coal Mines Company was maintained through Mr. Ramage in Spokane, was it not?

A. Well, Mr. Ramage was the President of the company and his office was in Spokane.

Q. Was there any office as such at the mine at Bellingham?

A. I'm sorry, I don't understand what you mean by "as such."

Q. As such, meaning a place where books and records are kept and correspondence pertaining to office management is conducted. [181]

A. Yes, sir.

Q. There was such an office there?

A. Yes, sir.

Q. Did you use that from time to time?

A. Yes, sir.

Q. Now, Mr. McMillan, the operations of the coal mine at Bellingham of the Bellingham Coal Mines Company from I think you said January 1st, 1952, on were under your personal and direct supervision, were they not? A. Yes, sir.

Q. And during that same time you were both a director and general manager of Bellingham Coal Mines and the manager of coal operations for Northwestern Improvement Company?

A. Yes, sir.

(Testimony of Earl R. McMillan.)

Q. Referring your attention, Mr. McMillan, to Defendant's Exhibit A-6, isn't it a fact, Mr. McMillan, that prior to the transmission of that note to Western Machinery Company by Mr. Herbert Little you approved the transmission of that note to Western Machinery Company?

Mr. Crosby: May I have the question read back to me, please?

The Court: Yes.

(The reporter read the last question.)

A. I do not recall even any knowledge of the transmission [182] of this note.

Q. (By Mr. Shapro): Isn't it a fact, Mr. McMillan, and I want you to be careful, to be precise in your answer to this question, that under date of and that you knew that under date of August 20, 1952, Mr. Ramage sent the note which is now marked Defendant's Exhibit A-6 to Mr. Little for his signature as Secretary, Mr. Ramage signed it, with express directions to and that Mr. Little did take up with you before mailing the note to Western Machinery Company the fact that it should be sent?

The Witness: Could I ask to have the question reread?

The Court: It will be read.

(The reporter read the last question.)

A. I do not recall Mr. Little calling me regarding the note before it was sent.

(Testimony of Earl R. McMillan.)

Q. (By Mr. Shapro): Would you say that he didn't contact you about it before?

A. I wouldn't say that he didn't, no, sir.

Q. Now, Mr. McMillan, isn't it a fact that the issuance of this note, Defendant's Exhibit A-6, was discussed by you with other officers and other directors of the Bellingham Coal Mines Company before it was sent to Western Machinery Company? [183]

A. It was discussed between the Board—or at a Board meeting. I don't recall offhand whether it was before or after the note had actually been sent.

Q. You wouldn't say that there were no discussions with you and other members of the Board or between you and other members of the Board concerning this note before it was sent to Western Machinery?

A. I have no recollection of any discussion of the note before it was sent.

Q. When did you first hear about the note?

A. On or about the time it was sent, or shortly thereafter.

Q. But you're sure you didn't hear about it before it was sent?

A. I wouldn't say that I hadn't heard about it, no.

Q. Did you ever object to the issuance or transmission of this note to Western Machinery Company? A. No, sir.

Q. Now, Mr. McMillan, you have testified that in, I think it was, the last day of July or the early part of August of 1952, which was before this note

(Testimony of Earl R. McMillan.)
was issued, that you received a telephonic request for payment from Western Machinery Company through a Mr. Goering; is that right?

A. That's right.

Q. Is that the first direct contact that you had with [184] Western Machinery Company concerning payment for this washing plant?

A. I don't recall that it was the first contact or not.

Q. You say you don't recall that it was the first, is that right? A. I do not recall that it was.

Q. Do you recall any prior contacts of that sort?

A. I do not recall any prior contact.

Q. In that conversation with Mr. Goering that took place about the last part of July, 1952, isn't it a fact that you told Mr. Goering that you hoped to be able to send between fifteen and twenty-five thousand dollars or have that much sent on this account and that you hoped that he would bear with you for the balance for a while?

A. I can't answer the latter part of that question the same as I would the first part of it.

Q. Well, then you break it up and answer it in two parts, if you will.

The Witness: Could I have the question read back, please?

The Court: That will be done.

(The reporter read the question beginning Line 9, this page.)

A. The answer to the first part of the question

(Testimony of Earl R. McMillan.)

is yes. [185] The answer to the second part of the question I would modify by saying yes, having reference to Bellingham Coal Mines Company, not me personally.

Q. (By Mr. Shapro): All right. Now, there was no inference, I want you to understand, sir, in my question that you personally undertook to pay this bill. There is no such contention. But you did then and in your own mind, referring to Bellingham Coal Mines Company, ask for the forbearance of the Western Machinery Company on this account, didn't you? A. That's right.

Q. Isn't it true also, Mr. McMillan, that after the note was issued and received by Western Machinery Company, that to your knowledge there were several requests for extensions of time for the payment of it after it became due on August the 18th, 1952—November the 18th, 1952?

A. Yes, sir.

Q. And isn't it fact, Mr. McMillan, that on several of those occasions you personally requested Mr. Little to ask for such forbearance on the note?

A. No, sir.

Q. Is it your testimony that you did not personally discuss with Mr. Little and suggest to him or ask that he contact Western Machinery Company or me for further [186] time on the payment of this note?

A. First, I don't understand what you mean by "personally." As a member——

Q. I mean vocally through your own mouth, sir.

(Testimony of Earl R. McMillan.)

A. As a member of the Board of Directors of Bellingham Coal Mines Company I concurred in the request of the other members of the Board that extension be granted.

Mr. Shapro: Might I have the answer read, your Honor?

The Court: You may.

Mr. Shapro: Thank you.

(The reporter read the last answer.)

Q. (By Mr. Shapro): During this same period of time covered by this last answer, Mr. McMillan, you still were manager of coal operations of Northwestern Improvement Company, weren't you?

A. Yes, sir.

Mr. Shapro: May I have these marked for identification, your Honor?

The Court: You may.

The Clerk: It will be marked Plaintiff's Exhibit No. 7.

(Three letters of transmittal and four invoices of Western Machinery Company were marked Plaintiff's Exhibit No. 7 for identification.) [187]

Mr. Shapro: Your Honor, might I state for brevity's sake, and Counsel I'm sure will agree, that the documents that your Honor has before him that have been marked Plaintiff's 7 represent a group of letters of transmittal of the bills of lading which have been already received in evidence as Defendant's Exhibits A-16 and A-17.

(Testimony of Earl R. McMillan.)

Mr. Crosby: Except as to one bill of lading. One of the bills of lading did not have any letter of transmittal.

Mr. Shapro: I will accept Counsel's stipulation.

Mr. Crosby: And I think that probably we should include in that stipulation which bill of lading it was.

Mr. Shapro: If you will make the statement of qualification I will accept it.

Mr. Crosby: The defendant will stipulate that the group of letters that has been marked Plaintiff's Exhibit No. 7 accompanied the bills of lading marked Defendant's Exhibits A-16 and A-17 except as to one bill of lading and packing list in Defendant's Exhibit A-17, and that exception is the bill of lading from Cutler-Hammer, Inc.

Mr. Shapro: I will accept that stipulation, [188] your Honor. May the witness be shown Plaintiff's Exhibit 7, your Honor?

The Court: That will be done.

(The bailiff handed the exhibit to the witness.)

Q. (By Mr. Shapro): Will you examine those letters of transmittal please, Mr. McMillan?

(Brief pause.)

A. Yes, sir.

Q. Having examined the contents of Plaintiff's Exhibit 7, Mr. McMillan, can you tell the Court that it is a fact that the bills of lading which com-

(Testimony of Earl R. McMillan.)
prise Exhibits A-16 and A-17 with the exception of the Cutler-Hammer bill of lading were actually transmitted to Northwestern Improvement Company by Western Machinery Company?

A. Apparently some of them were. I can't be sure that——

Q. Well, just so the record will be straight, Mr. McMillan, Mr. Crosby has stipulated that those letters of transmittal refer to the bills of lading which are described in Exhibits A-16 and A-17 except the Cutler-Hammer bill of lading. Having that stipulation in mind, is it not a fact that the bills of lading in question, namely in A-16 and A-17 with the exception of Cutler-Hammer, were transmitted by Western Machinery Company directly to Northwestern Improvement Company? [189]

A. I don't know that they were transmitted directly. They evidently eventually reached the office of Northwestern Improvement Company.

Q. Isn't it a fact, Mr. McMillan, that the letters of transmittal were directed to and received by the Northwestern Improvement Company?

Mr. Crosby: I submit, your Honor, the letters are self-explanatory.

The Court: This is cross-examination, is it not?

Mr. Crosby: I realize that, but it is argumentative with the witness. The letters are fully self-explanatory.

Mr. Shapro: I would say cross-examination is permissible.

(Testimony of Earl R. McMillan.)

The Court: I would say there is a reasonable limit on that. The objection is overruled.

Q. (By Mr. Shapro): Do you recall the question, sir? A. May I have the question read?

(The reporter read the question beginning Line 4, this page.)

A. Yes, sir.

Mr. Shapro: We offer at this time in evidence, your Honor, Plaintiff's Exhibit No. 7.

Mr. Crosby: I have no objection. [190]

The Court: Admitted.

(Plaintiff's Exhibit No. 7 for identification was admitted in evidence.)

Mr. Shapro: Your Honor, if it would be possible and convenient to the Court might I suggest a morning recess for about five minutes now? It would enable me to have the opportunity to review the notes on the direct testimony of the witness.

The Court: That is agreeable. Court will be at recess for approximately ten minutes.

Mr. Shapro: Thank you, your Honor.

(Short recess.)

The Court: The witness will resume the stand.

EARL R. McMILLAN

resumed the stand.

Mr. Shapro: May the witness be shown Defendant's Exhibit A-5, your Honor?

(Testimony of Earl R. McMillan.)

The Court: That will be done.

(Defendant's Exhibit No. A-5 was handed to the witness.)

Cross-Examination
(Continued)

By Mr. Shapro:

Q. Mr. McMillan, will you examine the letter dated August 15, '52, which is Defendant's Exhibit A-5, and when you have read it I will address another question to you. [191] Will you read that letter, not out loud, just to yourself.

(Brief pause.)

A. Yes, sir.

Q. Referring your attention, Mr. McMillan, to the second paragraph of that letter that begins, "Mr. McMillan advises us," and so forth, do you have that? A. Yes, sir.

Q. It is a fact, is it not, Mr. McMillan, that after your telephone conversation with Mr. Goering, which as you testified yesterday involved a suggestion from him or request that a conditional bill of sale, as you called it, be given on this equipment for security purposes, you did communicate that to Mr. Ramage, didn't you? A. Yes, sir.

Q. And isn't it also a fact, Mr. McMillan, that the directors of Bellingham Coal Mines Company suggested as an alternative or a substitute for the conditional bill of sale requested by Mr. Goering

(Testimony of Earl R. McMillan.)
that this note which is Defendant's Exhibit A-6 be given? A. I don't recall any such discussion.

Q. When in your presence was the issuance of this note to Western Machinery Company discussed for the first time? [192]

A. I don't remember when it was discussed.

Q. Do you remember with whom you first discussed the note?

A. As I said before, the only recollection I have was of a discussion in a Board of Directors meeting. I don't recall the date.

Mr. Shapro: I have no further questions, your Honor.

The Court: Anything further, Mr. Crosby?

Redirect Examination

By Mr. Crosby:

Q. Mr. McMillan, with reference to Mr. Shapro's question on cross-examination about Northwestern Improvement Company getting twenty per cent plus expenses, Mr. McMillan, what expenses was the Northwestern Improvement Company to get a twenty per cent override on?

A. The twenty per cent commission applied only to the services of the personnel loaned by the Northwestern Improvement Company to the Bellingham Coal Mines Company plus any supplies, mine supplies, or equipment furnished from Northwestern Improvement Company's mine at Roslyn to Bellingham Coal Mines Company, plus—well, I think

(Testimony of Earl R. McMillan.)
I've covered it. I was thinking of the engineering services.

The Court: I would like to know what this [193] twenty per cent commission was on. On what was it computed?

The Witness: Your Honor, it was computed on the prorated time of myself, for example, and the general superintendent of our mine at Roslyn for the time that he gave directly——

The Court: You are not getting at the meat of my question. I want to know on what principle you applied the factor of twenty per cent in your calculations to determine what the twenty per cent was in dollars and cents. What was the principle on which you multiplied or which was multiplied by twenty per cent in order to find out the dollars and cents equivalent of twenty per cent?

The Witness: Your Honor, for example—may I illustrate it?

The Court: I think you could say it in words, Mr. McMillan. If you can't, that will be sufficient.

The Witness: Well, the twenty per cent was multiplied by the proportion of my salary that was chargeable to the Bellingham Coal Mines Company, and the same for all the other personnel services given to the Bellingham Coal Mines Company.

The Court: I would like to know what you did to find out the principle to which you applied this [194] factor of twenty per cent as a multiplier.

The Witness: In the case of my salary, a fixed ratio or percentage of my salary was charged——

The Court: I don't care anything about the per-

(Testimony of Earl R. McMillan.)

centage of your salary. I am trying to find out on what you applied that twenty per cent in order to ascertain the twenty per cent of your salary or some other figure. We are not determining the percentage of your salary, we are trying to determine the percentage of something by which your salary was determined.

The Witness: Well, sir, your Honor, my salary —the salary to which I refer was my salary paid by Northwestern Improvement Company to me. Now, part of that salary was charged to the Bellingham Coal Mines Company.

The Court: Yes, sir, but I would just like to know how you determined how much it was, if it was twenty per cent of some kind of business done by Bellingham Coal Mines Company through the management of the Northwestern Improvement Company or your personal services irrespective of the corporation. I would like to know what it is. If you lend me a hundred dollars at six per cent, we multiply 100 by 6 to find out how many dollars it is. That is what I am trying to find out. What is the principle on which you used the [195] factor of twenty per cent?

The Witness: Well, except for my own salary, your Honor, which was the same every month, I don't recall exactly what the amount was, it was probably we'll say two hundred dollars, was charged to Bellingham Coal Mines Company, and twenty per cent was added to that and charged against the Bellingham Coal Mines Company. Now, in every other instance of the personnel it varied from month

(Testimony of Earl R. McMillan.)

to month depending upon how much time——

The Court: So the principle to which you applied twenty per cent as a multiplier was your salary, is that it, your salary that the Northwestern Improvement Company paid you ordinarily?

The Witness: Yes, sir.

The Court: You may proceed.

Mr. Shapro: Mr. McMillan——

Mr. Crosby: Pardon me.

Mr. Shapro: Oh, I'm sorry. I'm sure that Mr. McMillan has given your Honor unintentionally an erroneous impression of that figure. I would like your Honor's permission to attempt to clarify it, if I may.

The Court: You may do so. [196]

Recross-Examination

By Mr. Shapro:

Q. Mr. McMillan, you didn't intend to imply by the answer to the Court's last question that the only item upon which Northwestern Improvement Company added twenty per cent was the proportion of your salary which was charged to the Bellingham Coal Mines Company, did you?

The Court: The Court did not so understand. The Court understood that when he worked for them it applied in his case and when somebody else did work a like percentage of salary was added to the bill for services addressed to the Bellingham Coal Mines Company.

Q. (By Mr. Shapro): It is also true, Mr. Mc-

(Testimony of Earl R. McMillan.)

Millan, is it not, that to the cost of materials supplied to Bellingham Coal Mines Company by Northwestern Improvement Company was added twenty per cent?

A. The material was supplied from Roslyn, yes, sir.

The Court: Was that twenty per cent paid to you by the Bellingham Coal Mines Company personally directly or was it paid to the Northwestern Improvement Company?

The Witness: The Bellingham Coal Mines Company paid the Northwestern Improvement Company.

Q. (By Mr. Shapro): It is also true, Mr. McMillan, is it not, that in certain instances equipment which was [197] purchased by and owned by Northwestern Improvement Company and used by Bellingham Coal Mines Company was billed to Bellingham Coal Mines Company by Northwestern at cost plus twenty per cent?

A. I don't recall any items that were purchased from outside sources and furnished to Bellingham and then twenty per cent added to that.

Q. But how about equipment that was already in the possession of and owned by Northwestern Improvement Company, loaned to and used by Bellingham Coal Mines Company? There was such equipment, wasn't there?

A. Yes, sir, but that was under a rental arrangement.

Q. And isn't it true that to the rental arrange-

(Testimony of Earl R. McMillan.)

ment there was added twenty per cent by Northwestern Improvement Company?

A. I do not believe that twenty per cent of the rental was loaded onto the rental.

Q. Would you say it wasn't?

A. Not without looking at the records.

Q. Was the rental rate for equipment of Northwestern Improvement Company leased to or used by the Bellingham Coal Mines Company the standard rental rate or was it a figure arrived at by you?

A. It was arrived at by me because I was manager of the Bellingham Coal Mines Company. [198]

Q. And you were also the manager of coal operations at the same time of Northwestern Improvement Company, weren't you? A. Yes, sir.

Mr. Shapro: I have no further questions.

Redirect Examination

By Mr. Crosby:

Q. Mr. McMillan, did the Northwestern Improvement Company ever receive a twenty per cent override or commission on any services of employees of the Bellingham Coal Mines Company or on equipment that was purchased directly by the Bellingham Coal Mines Company?

A. No, sir.

Q. Did the Northwestern Improvement Company ever receive any twenty per cent commission or bill the Bellingham Coal Mines Company for a twenty per cent commission on the machinery that

(Testimony of Earl R. McMillan.)
was being obtained from Western Machinery Company? A. No, sir.

Q. As to any rental agreement for rental of equipment that was furnished by the Northwestern Improvement Company to the Bellingham Coal Mines Company, was the rental agreement approved by the Board of Directors of the Bellingham Coal Mines Company? [199] A. Yes, sir.

Mr. Crosby: I have no further questions.

The Court: This witness may step down.

(Witness excused.)

The Court: I ask you to consider accommodating professional men who may be called as witnesses. We try to do it in the case of doctors. I do not see any reason why we should not try to do it in the case of lawyers.

Mr. Shapro: We would like to do that, your Honor.

The Court: I wish you would do that.

Mr. Crosby: I would like to call Mr. Little, please.

The Court: Come forward and be sworn as a witness.

HERBERT S. LITTLE

called as a witness in behalf of defendant, being first duly sworn, was examined and testified as follows:

Mr. Crosby: Might the witness be handed Defendant's Exhibits A-6 and A-9, and I would like to have this letter marked.

(Testimony of Herbert S. Little.)

The Clerk: Defendant's Exhibit No. A-18.

(A letter dated November 17, [200] 1952, from E. J. Barshell to Herbert S. Little, was marked Defendant's Exhibit No. A-18 for identification.)

The Court: For the record, Mr. Crosby, let the witness state his name.

Direct Examination

By Mr. Crosby:

Q. Will you please state your name?

A. Herbert S. Little.

Q. What is your profession, Mr. Little?

A. I'm an attorney at law.

Q. With what law firm are you associated?

A. With the firm of Little, LeSourd, Palmer, Scott & Slemmons.

Q. Where is that firm located?

A. Hoge Building, Seattle.

Q. Have you ever been associated with the Bellingham Coal Mines, Incorporated, Mr. Little?

A. Yes.

Q. What was your relationship with that company?

A. Well, our firm was the general counsel for it and I was Secretary of the company and a member of the Board.

Q. During what period of time did that relationship exist?

A. From the time of its incorporation until it went into [201] Bankruptcy Court.

(Testimony of Herbert S. Little.)

Q. What year was it incorporated?

A. I would—I'm just thinking out loud. I think it was about 1950 or '51.

The Court: Did the company take over some new or some old mining properties?

The Witness: Well, it took over the old mining properties of what was known as the Bellingham Coal Mines. It acquired and issued stock for the leasehold interest and all of the buildings and equipment and also issued stock for a partial liquidating dividend.

The Court: With reference to the life of the Bellingham community, I mean regarding the length of time, what part of that community life length was this old company and mine associated, if you know?

The Witness: Approximately I would say 1918 or '19 to 1950 was the old company. That's rough, but I think it was 1918 or '19.

The Court: You may inquire.

Q. (By Mr. Crosby): Mr. Little, did the Bellingham Coal Mines Company have any association with the Northwestern Improvement Company?

A. Yes, it did.

Q. What was the nature of that association?

A. Well, first of all Mr. McMillan, who was the manager [202] of Northwestern Improvement Company, was also the operating manager of the Bellingham Coal Mines. In the second place, we—at least we negotiated an agreement between Bellingham Coal Mines and—that is the new company, and

(Testimony of Herbert S. Little.)
Northwestern Improvement Company with reference to management, the agreement which Mr. McMillan has just described.

Q. Mr. Little, would you please state whether or not the agreement, any agreement between the Bellingham Coal Mines Company and the Northwestern Improvement Company provided for the Northwestern Improvement Company to get any commission or compensation for equipment or supplies that were purchased or paid for by the Bellingham Coal Mines Company?

A. Well, the agreement which was prepared and acted upon did contain such a provision. I said acted upon because I think, as you know, it was not formally executed by Bellingham Coal Mines.

Q. Did I understand you to say where the Bellingham Coal Mines Company purchased equipment?

A. No, I wasn't talking about that. I was just talking about the execution of the agreement.

Mr. Crosby: Might we have the previous question read back to the witness?

The Court: It will be read. [203]

(The reporter read the question back as follows:

("Q. Mr. Little, would you please state whether or not the agreement, any agreement between the Bellingham Coal Mines Company and the Northwestern Improvement Company provided for the Northwestern Improvement Company to get any commission or compensa-

(Testimony of Herbert S. Little.)

> tion for equipment or supplies that were purchased or paid for by the Bellingham Coal Mines Company?")

A. I'm sorry, I misunderstood your question. I'm quite sure it did not.

Q. (By Mr. Crosby): Did the Bellingham Coal Mines Company consider under the terms of their agreement with Northwestern Improvement Company that the Northwestern Improvement Company was entitled to get any commission or profit from the purchase of the equipment from the Western Machinery Company?

Mr. Shapro: I object to that question, if your Honor please, upon the ground it calls for the opinion and conclusion of the witness.

The Court: Read the question. [204]

(The reporter read the last question.)

The Court: He is asking as a matter of fact.

Mr. Shapro: The word that I object to specifically is "consider." That is a state of mind.

The Court: The objection is sustained. You may ask a question in proper form and subject matter.

Q. (By Mr. Crosby): Did the Bellingham Coal Mines Company pay any twenty per cent commission to the Northwestern Improvement Company on any sums that the Bellingham Coal Mines Company paid to the Western Machinery Company toward the coal washing plant?

A. Not to my knowledge.

(Testimony of Herbert S. Little.)

Q. Mr. Little, referring to Defendant's Exhibit A-6——

A. Yes, I have it before me.

Q. Are you familiar with Exhibit A-6, Mr. Little. A. I am.

Q. Please state whether or not you ever had any conversations with representatives of the Western Machinery Company relative to A-6.

A. I did.

Q. When was your first conversation—approximately when was your first conversation with such representative and who was it, please?

A. Well, I had—I talked with Mr. Barshell over long distance telephone—I was in Seattle, he was in San [205] Francisco—with reference to the delinquent account, and it was following one or more of the conversations with reference to our indebtedness to the Western Machinery Company that——

Q. Pardon me, Mr. Little. First did you have anything to do with the sending of this note or the preparation of the note?

A. Yes, I mailed it.

Q. Yes. Prior to the mailing of the note did you have any conversation with representatives of the Western Machinery Company about the note?

A. Yes.

Q. And with whom did you have a conversation?

A. Mr. Barshell.

Q. Under what circumstances was the conversation held?

A. Well, he called me long distance and stated

(Testimony of Herbert S. Little.)

in substance that the company was somewhat over-extended because of all of the contracts they had outstanding, the work that they were doing, and that the bank was pressing them for payment and inquiring about this indebtedness of Bellingham Coal Mines, and I believe that at that time he stated to me that they would like to have a chattel mortgage or a conditional sales contract. I told him that we couldn't give any such chattel mortgage, that's my best recollection, that we couldn't [206] do it because it would constitute a preference in my opinion. He then said, "Well, can you at least give us a promissory note which will draw interest and which we can in turn assign to the bank," which I think was the American Trust Company, but I'm not positive, and so then that matter was taken up with Mr. Ramage and with the Board of Bellingham Coal Mines.

Q. Referring to Defendant's Exhibit A-9, is that a letter that you wrote, Mr. Little? A. It is.

Q. And to whom did you send the letter and what was enclosed with the letter?

A. The letter was to Mr. Barshell of Western Machinery and the promissory note was enclosed.

Q. I see.

Mr. Crosby: Your Honor, I ask that Defendant's Exhibits A-6 and A-9 be admitted in evidence.

Mr. Shapro: No objection, your Honor.

The Court: They are admitted.

(Defendant's Exhibits Nos. A-6 and A-9 for identification were admitted in evidence.)

(Testimony of Herbert S. Little.)

Q. (By Mr. Crosby): Mr. Little, prior to your sending the note, which is Defendant's Exhibit A-6, did any representative of the Western Machinery Company request through you to have any other company sign on the note [207] along with Bellingham Coal Mines Company?

Mr. Shapro: I will object to that question, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial. In other words, we take the position, if your Honor please, that it will not tend to prove or disprove any issue in this case as to whether or not we asked to have somebody else sign the note besides Bellingham.

Mr. Crosby: I think it is very material, your Honor, in this case to show that the plaintiff took a promissory note from Bellingham Coal Mines Company to which machinery was furnished and didn't request the Northwestern Improvement Company to sign on the note. Since they have been contending that the Northwestern Improvement Company was obligated on this bill for the machinery I feel it is very material, and as a matter of fact Counsel, in cross-examining Mr. McMillan, inquired relative to whether or not his approval was requested about the note.

Mr. Shapro: Your Honor, we have a situation here where, as your Honor ruled yesterday, Counsel, in connection with an affirmative defense, can't put in all its case at one time, and I am cognizant of that, but I say to your Honor that on the face of the record we had a contract obligation directly

(Testimony of Herbert S. Little.)
with Northwestern [208] Improvement Company. The mere fact that we took, and even as the witness testifies we requested a note from Bellingham Coal Mines Company, would not change the other situation and that we were not required as a matter of law to take any affirmative action such as to preserve our rights against Northwestern such as to ask that they join in the note, too. We already had, and so far as we are concerned we still have, the direct and primary obligation, an original obligation of Northwestern Improvement Company.

The Court: The objection is overruled.

A. I do not recall any request on the part of any representative of Western Machinery on or about this time for the signature of any other party.

Q. (By Mr. Crosby): Mr. Little, referring to what has been marked as Defendant's Exhibit A-18, do you recognize that?

A. I have it before me, yes.

Q. What is that exhibit, Mr. Little?

A. It's a letter, dated November 17, 1952, from Western Machinery Company, signed by Mr. Barshell, addressed to me.

Q. And generally what is the subject matter of the letter?

A. Mr. Barshell expresses sorrow about——

The Court: No, just the nature of the [209] letter or the subject matter discussed in it.

A. It's a letter relating to the payment of the

(Testimony of Herbert S. Little.)

account of Bellingham Coal Mines with Western Machinery.

The Court: Will you speak the clerk's identifying mark if you see it on there?

A. Defendant's A-18.

The Court: Thank you. You may inquire.

Mr. Crosby: I ask that Defendant's Exhibit A-18 be admitted in evidence.

Mr. Shapro: No objection.

The Court: It is admitted.

(Defendant's Exhibit No. A-18 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Mr. Little, following your transmittal of the promissory note which is Defendant's Exhibit A-6 to the Western Machinery Company did you have any other conversations with representatives of the Western Machinery Company relative to payment of the note?

A. Yes.

Q. Do you have any idea how many?

A. I really can't tell you how many. There probably were several, maybe two or three. Maybe once a month Mr. Barshell would phone me or I might phone him to tell him the status of the R. F. C. application, and then later on, I've forgotten how much later but later on [210] I had a call from Mr. Shapro and talked with Mr. Shapro, but that was several months later.

Q. Was there any correspondence, Mr. Little, exchanged between your office by you and the West-

(Testimony of Herbert S. Little.)
ern Machinery Company relative to the payment of the note which is Defendant's Exhibit No. A-6?

A. There was an exchange of correspondence, several letters backward and forward.

Q. At any time prior to your receiving a call from Mr. Shapro in the conversations that you had with representatives of the Western Machinery Company or in the correspondence with them, was there any reference to Northwestern Improvement Company's responsibility on the promissory note?

A. Not until——

Mr. Shapro: If your Honor please, I'm going to object to that question on the ground that it's leading and suggestive and assumes a fact not in evidence, namely, that there was any contention at any time that Northwestern Improvement Company is responsible on this note. The note is the Bellingham Coal Mines' note.

The Court: The objection is overruled.

A. To the best of my knowledge there was no statement with reference to any liability of Northwestern Improvement [211] Company that came to my attention until somewhere around January or February or March, I think February, 1953. That was the first time I think I heard about it.

Mr. Crosby: I have nothing further, your Honor.

The Court: You may cross-examine.

Mr. Shapro: Yes, your Honor.

(Testimony of Herbert S. Little.)

Cross-Examination

By Mr. Shapro:

Q. Mr. Little, you testified on direct examination that the issuance or the execution and delivery of this note to Western Machinery Company was discussed by you with the Board of Directors of Bellingham Coal Mines Company, is that correct?

A. It was.

Q. And was Mr. McMillan present at those discussions? A. Yes, I'm sure he was.

Q. It's a fact, is it not, Mr. Little, that at the time you transmitted this promissory note to Western Machinery Company you did not know and had not previously been advised by anyone of the fact that the original order for this equipment and the original invoice for this equipment was from Western Machinery Company to Northwestern Improvement Company? [212]

A. That is correct.

Q. In your conversation with Mr. Barshell at which the note was suggested it is true, is it not, Mr. Little, that no mention was made by you or by Mr. Barshell of releasing the Northwestern Improvement Company by reason of the acceptance or the delivery of this note?

A. It wasn't even mentioned.

Q. It wasn't even mentioned? A. No, sir.

Q. It's also true, is it not, Mr. Little, that the extensions of time or indulgence that you, on be-

(Testimony of Herbert S. Little.)
half of Bellingham Coal Mines Company, asked in connection with the claims of Western Machinery Company prior to the note were done at the request of the Board of Directors of Bellingham Coal Mines Company?

A. Yes. We couldn't pay our debts.

Q. And it's true also, is it not, that those requests were discussed before they were made by you with members of the Board of Directors of Bellingham Coal Mines Company?

A. On several occasions we were discussing the fact that the R. F. C. loan hadn't come through and we were unable to pay for most items of equipment.

Q. And you were requested as a result of some of those meetings to contact either Mr. Barshell or some other [213] representative of the Western Machinery Company to obtain indulgence on the claim, isn't that right?

A. Yes, as well as other creditors.

Q. As well as other creditors, and it's true, is it not, that Mr. McMillan participated in those meetings? By "the meetings," I mean the meetings as a result of which you were requested to make these applications for credit indulgence.

A. Yes. I'm not sure whether he was at every meeting. I think he was, because he was an important employee of the company and we naturally arranged meetings so that he could be present, but the minutes themselves would be the best evidence

(Testimony of Herbert S. Little.)

of that. But he was at most if not all of the meetings.

Q. Isn't it a fact also, Mr. Little, that the only contact personally between the Bellingham Coal Mines Company and Northwestern Improvement Company was with Mr. McMillan?

A. Well, that I can't positively answer. I'd say, generally speaking, that would be true because he was manager of both, but there may have been occasions when directors or officers might have talked with other representatives of Northwestern Improvement. I know of none myself, but there could have been.

Q. My question, of course, was limited to your own [214] knowledge, Mr. Little? A. Yes.

Q. Now, Mr. Little, it's true, is it not, also that before——

A. May I make one exception to that?

Q. Certainly.

A. There was a time when I talked with the attorney for Northwestern Improvement Company, but that was months later.

Q. And that was after the issuance of the note?

A. Long after.

Q. And it was after you had been informed, as you previously testified, for the first time that there was some claim directly against Northwestern?

A. That's correct.

Q. That would be in the early part of 1953?

A. Yes, I think so.

(Testimony of Herbert S. Little.)

Q. And wasn't it at the time that I visited your office here in Seattle for that purpose?

A. That's correct.

Q. Isn't it a fact also, Mr. Little, that prior to your transmission of this note to Western Machinery Company by your letter of August 23rd, which is Defendant's Exhibit A-9, that you went over the note or discussed prior to its transmission the transmission of the note [215] with Mr. McMillan?

A. I believe I did. I'm not positive as to any particular conversation with Mr. McMillan about it. I received the note from Mr. Ramage, I had the approval of the Board to execute it and send it down, and I believe I discussed it with Mr. McMillan but it's hard for me to refresh my recollection.

Q. I'll attempt to do so in a moment, Mr. Little.

A. Fine.

The Clerk: Plaintiff's Exhibit No. 8.

(Copy of letter, dated Aug. 20, 1952, from Jas. S. Ramage to Herbert S. Little, was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Shapro): Mr. Little, I show you Plaintiff's Exhibit No. 8, and after you have read it I will ask you whether or not that refreshes your recollection as to the circumstances under which you received and transmitted the note in question

(Testimony of Herbert S. Little.)

with reference to prior approval thereof by Mr. McMillan.

A. Yes, after reading this exhibit, Plaintiff's Exhibit 8, I recall after receiving the note from Mr. Ramage pursuant to his request I discussed with Mr. McMillan the discrepancy in the amount, and we decided the discrepancy was not important enough to delay sending the note down to Mr. Barshell. [216]

Q. Am I correct in understanding from your testimony, Mr. Little, that the letter which you have in your hand and marked Plaintiff's Exhibit 8 is the letter of transmittal to you of the note signed by Mr. Ramage prior to a signature by you?

A. That's correct.

Q. And am I also correct in understanding from your testimony, Mr. Little, that pursuant to that letter from Mr. Ramage, Plaintiff's Exhibit 8, you proceeded to follow out the instructions or suggestions contained therein from Mr. Ramage?

A. Yes, and I can further refresh my recollection by Defendant's Exhibit A-9, my letter to Mr. Barshell, in which I state that I have discussed it with Mr. McMillan.

Mr. Shapro: We offer in evidence at this time, if your Honor please, the document marked Plaintiff's Exhibit 8.

Mr. Crosby: I have no objection, your Honor.

The Court: Admitted.

(Plaintiff's Exhibit No. 8 for identification was admitted in evidence.)

(Testimony of Herbert S. Little.)

The Court: What do you call it?

Mr. Shapro: It is a letter from the President of the Bellingham Coal Mines to Mr. Little enclosing the note for signature and transmission to [217] Western Machinery Company after it was to be discussed with Mr. McMillan.

Q. (By Mr. Shapro): You testified, Mr. Little, I believe at the opening of my cross-examination that the issuance of this note to Western Machinery Company was discussed by you with the Board of Directors before it was issued. Is that right?

A. Yes, sir.

Q. And that Mr. McMillan was a member of the Board and present at that meeting, is that correct?

A. Well, I said that I'm sure that he was at a Board meeting when the giving of the note was discussed. Whether he was at all of the meetings at which it was discussed or not, I don't know.

Mr. Shapro: I have no further questions, your Honor.

The Court: Anything further?

Mr. Crosby: I have no further questions, your Honor.

The Court: You may be excused, Mr. Little.

(Witness excused.)

Mr. Koch: May I address the Court for just a moment, your Honor?

The Court: Yes, that is agreeable, Mr. Koch.

Mr. Koch: In order to spare Mr. Little, [218] he is a rebuttal witness and we would be glad to

put him on now out of order in order that he not have to return.

The Court: I can't very well do it now. He will have to return anyway, Mr. Koch. I will have to ask that he come back this afternoon if you need to use him again.

Mr. Shapro: I don't want to discommode Mr. Little in the least. If your Honor will give me just a moment we may be able to dispense with any further attendance.

Mr. Little: Thank you. I will appreciate it.

Mr. Shapro: Just a moment, Mr. Little.

(Brief pause.)

Mr. Shapro: May I ask one more question of Mr. Little on cross-examination?

The Court: You may.

Mr. Shapro: Thank you, your Honor.

HERBERT S. LITTLE

resumed the stand.

Cross-Examination
(Continued)

By Mr. Shapro:

Q. Am I correct in my understanding, Mr. Little, of your testimony that when you told Mr. Barshell that a contract of conditional sale or a chattel mortgage as far as Western Machinery Company was not acceptable because it might be a preference by reason of the [219] financial condition then of Bellingham Coal Mines Company, that you, or was

(Testimony of Herbert S. Little.)

it he that suggested the promissory note? I just want to be sure as to who from your testimony suggested it.

A. It was—I frankly am unable to refresh my recollection completely whether it was he who asked me or whether it was I who suggested it. I know that I did tell him that I would recommend that the Bellingham Coal Mines give Western Machinery a promissory note and pay interest because of their forbearance, and so I told him I would recommend it. Now, whether he requested it because of the desire to assign the note to the bank or whether I suggested it and then he welcomed the suggestion in lieu of a chattel mortgage, my direct recollection isn't too clear.

Q. Thank you, Mr. Little.

Mr. Shapro: Thank you, your Honor. We will have no further examination of Mr. Little.

The Witness: Thank you.

The Court: Is there any objection to excusing him permanently?

Mr. Crosby: I have no objection, your Honor.

Mr. Shapro: No, your Honor.

The Court: You may be permanently excused, Mr. Little. [220]

The Witness: Thank you, your Honor.

(Witness excused.)

The Court: At this time we will take the noon recess until 1:45.

(At 12:00 o'clock noon a recess was taken until 1:45 o'clock p.m.)

Friday, June 15, 1956—1:45 o'Clock P.M.

(All parties present as before.)

The Court: You may proceed with the case on trial.

Mr. Crosby: I would like to call Mr. Barshell.

The Court: Come forward, Mr. Barshell. You have already been sworn. You may now take the stand as a defendant's witness.

EDWIN J. BARSHELL

recalled as a witness in behalf of defendant, being previously duly sworn, was examined and testified further as follows:

Mr. Crosby: Might the witness be handed Defendant's Exhibits A-6, A-7, A-8 and A-9?

The Court: That will be done. [221]

(The exhibits referred to were handed to the witness.)

Mr. Crosby: And might these purchase orders of Western Machinery Company be marked as one exhibit? Is that satisfactory, Counsel?

Mr. Shapro: That is satisfactory.

The Clerk: They will be marked Defendant's Exhibit A-19.

(A group of purchase orders of Western Machinery Co was marked Defendant's Exhibit No. A-19 for identification.)

Direct Examination

By Mr. Crosby:

Q. Mr. Barshell, referring to Defendant's Ex-

(Testimony of Edwin J. Barshell.)

hibit No. A-8, would you please state what that is?

A. The ledger account of the Northwestern Improvement Company in the records of the Western Machinery Company.

The Court: Which exhibit is that?

A. Exhibit A-8, your Honor.

The Court: A-8. You may proceed.

Q. (By Mr. Crosby): The purchase of what equipment does that cover, Mr. Barshell?

A. The purchase of a coal washing plant.

Q. To whom was the coal washing plant delivered, Mr. Barshell? [222]

A. Without reference to the bills of lading I wouldn't know, Mr. Crosby.

Q. Does the Western Machinery Company have any other accounts receivable ledger covering the equipment which was delivered to the Bellingham Coal Mines Company at Bellingham, Washington?

A. Are you speaking of this same equipment?

Q. Yes, Mr. Barshell. A. No.

Mr. Crosby: May the witness be handed Plaintiff's Exhibits 3 and 4, please?

(The exhibits were handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, would you please look at Plaintiff's Exhibits 3 and 4, and comparing the amounts shown on those exhibits with the amounts shown on Defendant's Exhibit A-8, would you please state whether or not the accounts receivable ledger A-8 of the Western Ma-

(Testimony of Edwin J. Barshell.)

chinery Company covers the invoices which are Plaintiff's Exhibits 3 and 4?

A. Plaintiff's Exhibit 3 is reflected on Defendant's Exhibit A-8.

Mr. Crosby: Your Honor, I would like to ask that Defendant's Exhibit A-8 be admitted in evidence.

Mr. Shapro: No objection, your Honor.

The Court: Admitted. [223]

(Defendant's Exhibit No. A-8 for identification was admitted in evidence.)

Q. (By Mr. Crosby): Mr. Barshell, referring to Defendant's Exhibit A-6——

The Court: That is the promissory note, I believe.

Q. (By Mr. Crosby): ——which is the promissory note, and Defendant's Exhibit A-7, would you please first state what Defendant's Exhibit A-7 is?

A. Defendant's Exhibit A-7 is a ledger sheet reflecting the note receivable of the Bellingham Coal Mines.

Q. Would you please state whether or not Defendant's Exhibit A-7 reflects the amount due under the promissory note which is Defendant's Exhibit A-6?

A. The original entry on Defendant's Exhibit A-7 reflects the amount of the promissory note.

Mr. Crosby: I would like to ask that Defendant's Exhibit No. A-7 be admitted in evidence.

Mr. Shapro: If your Honor please, we object

(Testimony of Edwin J. Barshell.)

to the introduction of Defendant's Exhibit A-7 upon the ground that no proper foundation is laid and that it will not tend to prove or disprove any issue in this case. It follows along with the same line of objection we made to the note itself. This is a note receivable ledger sheet which the witness has identified. [224]

The Court: The objection is overruled. Defendant's Exhibit A-7 is now admitted.

(Defendant's Exhibit No. A-7 for identification was admitted in evidence.)

The Court: What is the status, according to your record, Mr. Clerk, as to Defendant's Exhibit A-6?

The Clerk: That has been admitted, your Honor.

The Court: You may proceed.

Q. (By Mr. Crosby): Mr. Barshell, referring to Defendant's Exhibit A-9, would you please state whether or not the Western Machinery Company received that letter in connection with the promissory note which is Defendant's Exhibit A-6?

A. It did.

Q. Would you please read from Defendant's Exhibit A-9, which is Mr. Little's letter to the Western Machinery Company, dated August 23rd, part way down in the middle of the second paragraph, starting with the words, "So that you may have"——

A. "So that you can have"?

Q. "So that you can have." A. Yes.

(Testimony of Edwin J. Barshell.)

Q. Having that in mind, would you please state what the Western Machinery Company did with the promissory note, A-6, following receipt of the note by the Western [225] Machinery Company?

Mr. Shapro: I object, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial as to what the plaintiff did with the note after its receipt. No foundation has been laid.

The Court: Overruled.

A. The Western Machinery Company discounted the note with its bank.

Q. (By Mr. Crosby): Which bank, Mr. Barshell?

A. The American Trust Company, San Francisco, California.

The Court: Read the last statement of the witness.

(The reporter read the last answer.)

The Witness: Your Honor, may I——

The Court: Yes.

The Witness: May I insert, it was discounted with recourse.

The Court: What did you understand that that meant in the mind of whoever made that comment?

Mr. Crosby: Your Honor, I move the last comment be stricken as not responsive to the question and as something that could be brought out on cross-examination if opposing Counsel feels that it is important.

Mr. Shapro: The question, your Honor, [226]

(Testimony of Edwin J. Barshell.)

called for what was done, and the witness testified it was discounted with the bank and then said, "with recourse." If that is what was done with it, it is responsive to the question.

Mr. Crosby: I still feel, your Honor, that the question was answered and there was no further question before the witness, and I ask that the independent remark be stricken.

The Court: The Court overrules the objection and denies the request.

Mr. Crosby: May the witness please be handed Defendant's Exhibit A-18?

(The exhibit was handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, would you please state whether or not that is your signature on the letter? A. It is, Mr. Crosby.

Q. And did you prepare the letter?

A. I did, Mr. Crosby.

Q. Did you forward Defendant's Exhibit A-18 to Mr. Little? A. I did.

Mr. Crosby: May the witness please be handed Defendant's Exhibit A-4?

(The exhibit was handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, referring to Defendant's Exhibit A-4 and locating in A-4 the check which is [227] numbered 1017, would you please state what the balance was as of the date of that check or at the time the Western Machinery Company received the check on the promissory note which is Defendant's Exhibit A-6?

(Testimony of Edwin J. Barshell.)

A. At the time this check was received?

Q. At the time that check was received.

A. Mr. Crosby, I would not know.

Mr. Crosby: May the witness please be handed Plaintiff's Exhibit 5 and Defendant's Exhibit A-15?

(The exhibits were handed the witness.)

Q. (By Mr. Crosby): Mr. Barshell, will you please examine Defendant's Exhibit A-15 and Plaintiff's Exhibit 5 for a moment?

A. Yes, Mr. Crosby.

Q. Would you please state from Plaintiff's Exhibit 5 what the balance was of the Bellingham Coal Mines open account shown by Exhibit 5 at the time Western Machinery received the Check No. 1017 in Defendant's Exhibit A-4?

A. The balance on Plaintiff's Exhibit 5 reflected a debit balance of $314.21 on the Bellingham Coal Mines account.

The Court: Read the question, Mr. Reporter.

(The reporter read the last question.)

The Court: You may proceed.

Mr. Crosby: I believe that is all the questions I have. If I may have just one second to [228] check my notes, your Honor——

The Court: You may.

(Brief pause.)

Mr. Crosby: That is all the questions I have of this witness, your Honor.

(Testimony of Edwin J. Barshell.)

Mr. Shapro: Your Honor, may I see the exhibits the witness has before him and has used in his testimony?

The Court: You may.

(The exhibits were handed Mr. Shapro.)

Mr. Crosby: I'm sorry, your Honor, there was one additional exhibit, A-19, which I had marked for identification which I neglected to cover by this witness. Might I have the permission of the Court to——

The Court: You may.

Q. (By Mr. Crosby): Mr. Barshell, would you please refer to Defendant's Exhibit A-19 and state what that is?

A. A duplicate copy of the purchase order issued by Western Machinery Company to the Allis-Chalmers Manufacturing Company.

The Court: Is that thing to which you related, A-19, a part of any exhibit now marked in this case, Mr. Barshell?

A. Exhibit A-19, your Honor, is a duplicate copy of the original purchase order plus change orders [229] Nos. 1, 2 and 3 of a purchase order issued by the Western Machinery Company to the Allis-Chalmers Manufacturing Company.

The Court: Is the latter a part of any exhibit previously marked?

A. Are you asking me, your Honor?

The Court: Yes, I am.

A. Not that I know of, your Honor.

(Testimony of Edwin J. Barshell.)

The Court: You may inquire.

Q. (By Mr. Crosby): Mr. Barshell, would you please state whether or not the equipment shown in Defendant's Exhibit A-19 is a part of the equipment shown in Plaintiff's Exhibit No. 1? And would you like to have No. 1 handed to you?

(Plaintiff's Exhibit No. 1 was handed the witness.)

A. The equipment listed is a part of the equipment shown in—the equipment shown in Defendant's Exhibit A-19 is a part of the equipment shown in Plaintiff's Exhibit No. 1.

Mr. Crosby: Your Honor, I would like to ask that Defendant's Exhibit A-19 be admitted in evidence.

Mr. Shapro: Your Honor, might I ask the Court's permission to request Counsel to state the purpose that he has in mind in offering that [230] evidence? I am frank to say I don't know, and I——

The Court: Let both Counsel look at this, first the defendant's and then plaintiff's.

(Counsel confer privately.)

Mr. Crosby: Do you have any objection?

Mr. Shapro: No, I have no objection, your Honor.

Mr. Crosby: I now ask that Defendant's Exhibit A-19 be admitted in evidence.

The Court: It is admitted.

(Defendant's Exhibit No. A-19 for identification was admitted in evidence.)

(Testimony of Edwin J. Barshell.)

The Court: I wish you would give it a name, Mr. Crosby, if you can do so.

Mr. Crosby: Defendant's Exhibit A-19 is the purchase order of Western Machinery directed to Allis-Chalmers covering a portion of the equipment which was forwarded to Bellingham Coal Mines.

The Court: Didn't the witness say something about it being a duplicate invoice or a duplicate, not purchase——

The Witness: Duplicate purchase order, your Honor.

The Court: Duplicate purchase order.

The Witness: Not the original. [231]

The Court: That is sufficient. Anything else?

Mr. Crosby: Your Honor, the Court may have ruled on my request for admission but I didn't——

The Court: A-19?

Mr. Crosby: Yes, A-19.

The Court: It is admitted.

Mr. Crosby: Thank you, very much. That is all I have of this witness.

The Court: You may cross-examine.

Cross-Examination

By Mr. Shapro:

Mr. Barshell, will you examine Defendant's Exhibits A-8 and A-7, please?

(The exhibits were handed the witness.)

Q. Mr. Barshell, referring your attention to Exhibit A-8 which you identified as the account re-

(Testimony of Edwin J. Barshell.)

ceivable of Northwestern Improvement Company with Western Machinery Company, will you tell me from the record upon receipt of the promissory note from Mr. Little enclosed with his letter of August 23rd what entry was made in the books of Western Machinery Company to reflect that transaction?

A. A journal entry was made giving credit on A-8 and [232] reflecting a debit on A-7 so that we would not have a duplication of assets by reflecting an account receivable and also a note receivable when the amounts of money were still only the same.

Q. Mr. Barshell, when, as you testified, your company discounted this note of Bellingham Coal Mines Company with the American Trust Company, what entry, if any, was made on the books of Western Machinery Company to reflect that transaction?

A. On Defendant's Exhibit A-7 a credit was shown to the Bellingham Coal Mines note receivable account and the offset is a debit to cash received from the bank.

Q. Did the Western Machinery Company repurchase that note which is Exhibit A-6?

A. It repurchased that note.

Q. And at that time when it repurchased the note from the bank, the American Trust, what entry, if any, was made in the records of Western Machinery Company to reflect that transaction?

(Testimony of Edwin J. Barshell.)

A. A check was issued by the Western Machinery Company to the American Trust Company for the sum—is that——

Q. Yes.

A. For the sum of $51,341.99, reflecting principal and interest. The debit for that check was restored to the note receivable ledger reflected on Defendant's [233] Exhibit A-7 as an obligation of the Bellingham Coal Mines.

Q. According to the records of Western Machinery Company as they exist at the present time does Northwestern Improvement Company owe Western Machinery Company any money?

Mr. Crosby: I object to that question as improper cross-examination. The direct examination went to the two ledger sheets in evidence which are Defendant's Exhibits A-7 and A-8, and there was no other direct examination pertaining to ledger sheets of the Western Machinery Company.

Mr. Shapro: Your Honor, if you will examine Exhibits A-8 and A-7 you will find that on A-8 there is a zero balance in the account receivable ledger of this Bellingham Coal Mines account. This is cross-examination.

The Court: If confined to those two exhibits——

Mr. Shapro: My question should have been, if it wasn't, directed to and limited to those exhibits.

The Court: As to what they show?

Mr. Shapro: That's right—no, your Honor. The question that I asked and that I believe is proper is whether, according to the records of Western

(Testimony of Edwin J. Barshell.)

Machinery Company that are before the witness, there is anything [234] owing to Western Machinery Company by Northwestern Improvement Company.

The Court: In view of the possibility of the witness being misled in a too all-inclusive scope of your inquiry the objection is sustained. You may ask a question in proper form.

Q. (By Mr. Shapro): Mr. Barshell, was the account receivable evidenced by Exhibit A-8 of Northwestern Improvement Company ever paid in full?

Mr. Crosby: I object to that question as being improper cross-examination. There was nothing on direct examination about payment. It merely pertained to ledgers.

The Court: This objection is overruled.

Q. (By Mr. Shapro): Do you understand the question, Mr. Barshell, or do you want it read?

A. I would like to have it read.

The Court: Read it, Mr. Reporter.

(The reporter read the question, beginning Line 7, this page.)

A. It was cleared by journal entry.

Q. (By Mr. Shapro): Was any money received in payment of it?

A. $15,000 of the original balance was received in money.

The Court: The original balance that was [235] shown on that exhibit?

(Testimony of Edwin J. Barshell.)

A. On Exhibit No. A-8, your Honor, which had a balance of $71,038.71.

Q. (By Mr. Shapro): How much, according to Exhibits A-7 or A-8, whichever—if either indicates that fact, was paid on the promissory note of Bellingham Coal Mines Company after it was received?

A. Mr. Shapro, this ledger sheet has a pencilled notation in my handwriting which indicates a principal amount paid of $7,089.76 as having actually been received.

Mr. Shapro: That's all, your Honor.

The Court: You may step down.

Mr. Crosby: Your Honor, I have one further question.

The Court: You may do so.

## Redirect Examination

By Mr. Crosby:

Q. Mr. Barshell, referring to Defendant's Exhibit A-4, which is a group of checks——

(The exhibit was handed the witness.)

Q. Would you please state whether or not the $15,000 payment to which you referred a moment ago as being shown on Defendant's Exhibit A-8 was received by you from one of those checks in Defendant's Exhibit A-4? [236]

A. This check was received by Western Machinery Company.

Q. What is the number of the check, please, in Exhibit A-4?

(Testimony of Edwin J. Barshell.)

A. In Exhibit A-4 a check drawn on the Seattle First National Bank at Bellingham, dated August 15, 1952, in the sum of $15,000 was received by the Western Machinery Company.

Q. And state whether or not the $15,000 credit on Exhibit A-8 was due to Western Machinery Company's receipt of that check.

A. Yes, Mr. Crosby.

Mr. Crosby: That's all the questions I have.

Mr. Shapro: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Call the defendant's next witness.

Mr. Crosby: Your Honor, the defendant rests its case.

The Court: The plaintiff may now proceed with its rebuttal.

Mr. Shapro: The plaintiff will recall, with the Court's permission, at this time Mr. Huckaba.

The Court: Come forward, Mr. Huckaba. You have already been sworn, Mr. Huckaba. You may resume the stand for further interrogation at this time in rebuttal. [237]

J. STANLEY HUCKABA

recalled as a witness in behalf of plaintiff, being previously duly sworn, was examined and testified further in rebuttal as follows:

(Testimony of J. Stanley Huckaba.)

Direct Examination

By Mr. Shapro:

Q. Mr. Huckaba, do you recall the conversation you had with Mr. McMillan on February 22, 1952, which was the time the quotation and order, which is Plaintiff's Exhibit No. 1 in this case, was given to you by Mr. McMillan? Do you recall that situation and circumstance, or the occasion, do you recall that occasion?

A. The occasion on which the order was taken by myself?

Q. Yes.

A. From Northwestern Improvement Company?

Q. Yes. Do you understand my question? It's merely, do you recall that such an event happened?

A. Yes, I do.

Q. In that conversation and at the time you were given Plaintiff's Exhibit No. 1 with the name Bellingham Coal Mines Company stricken and a rubber stamped name, Northwestern Improvement Company, substituted, did Mr. McMillan tell you that he made——

Mr. Crosby: I object to that question——

Mr. Shapro: Just a moment.

The Court: Wait until the question is [238] finished and then if you wish to object, you may.

Mr. Shapro: May I have it read, your Honor? I'm sorry, I lost the——

The Court: You may read it, Mr. Reporter.

(Testimony of J. Stanley Huckaba.)

(The reporter read the question as follows:

("Q. In that conversation and at the time you were given Plaintiff's Exhibit No. 1 with the name Bellingham Coal Mines Company stricken and a rubber stamped name, Northwestern Improvement Company, substituted, did Mr. McMillan tell you that he made"——)

Q. (By Mr. Shapro): Did Mr. McMillan tell you at that time that he made that change and gave you that order on the understanding that Bellingham Coal Mines Company would pay for that equipment?

Mr. Crosby: I object to that question as being leading, your Honor.

Mr. Shapro: If your Honor please, this is rebuttal. This is putting categorically to this witness the substance of the previous witnesses' testimony.

Mr. Crosby: Your Honor, the question wasn't framed in that manner. It was a leading question and [239] had no reference to any testimony in defendant's case.

The Court: The objection is overruled. Read the question, please.

(The reporter read the question as follows:

("Q. In that conversation and at the time you were given Plaintiff's Exhibit No. 1 with the name Bellingham Coal Mines Company stricken and a rubber stamped name, Northwestern Improvement Company, substituted, did Mr. McMillan tell you at that time that

(Testimony of J. Stanley Huckaba.)

he made that change and gave you that order on the understanding that Bellingham Coal Mines Company would pay for that equipment?")

A. I do not recall that he did make such a statement.

Mr. Shapro: That's all.

Cross-Examination

By Mr. Crosby:

Q. Mr. Huckaba, you have no recollection one way or the other whether that statement was made, isn't that right?

A. I do not recall that it was made. [240]

Q. Mr. Huckaba, isn't it just that you don't have any recollection one way or the other about the statement?

Mr. Shapro: Your Honor, I think the question has already been asked and answered.

The Court: The objection is overruled.

A. That is correct.

Mr. Crosby: That's all the questions I have.

Mr. Shapro: No further questions.

The Court: Step down.

(Witness excused.)

Mr. Shapro: The plaintiff will recall Mr. Barshell, your Honor.

The Court: Come forward. Resume the stand, Mr. Barshell. You have already been sworn.

EDWIN J. BARSHELL

recalled as a witness in behalf of plaintiff, being previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

By Mr. Shapro:

Q. Mr. Barshell, in your capacity as Controller of Western Machinery Company, have you anything to do with the collection of accounts and notes receivable? A. I have.

Q. And what is your connection with that? [241]

A. I supervise all accounting, all credit for the Western Machinery Company's entire organization.

Q. Does that include collections?

A. That includes the collection of accounts.

Q. Do you know, and if you will please answer the question yes or no as the case may be, do you know of your own knowledge why, between the due date of the Bellingham Coal Mines note, which was November 18, 1952, and the first week in March of 1953, no demands were made by Western Machinery Company upon Northwestern Improvement Company for the payment of any moneys on account of this coal washing plant?

Mr. Crosby: Your Honor, I object to the form of that question as leading.

The Court: Who said what as far as this witness is concerned?

Mr. Shapro: Your Honor, I'm not calling for

(Testimony of Edwin J. Barshell.)

a conversation at all. I'm calling for his answer yes or no as to whether he knows why, knows the reason for we'll call it the inactivity of Western Machinery Company toward Northwestern Improvement. Your Honor will recall Mr. McMillan testified yesterday that there was no demand made upon Northwestern Improvement Company to his knowledge by Western Machinery Company after the note became due up to the time he met me [242] in the San Francisco office of Western Machinery Company, which was the first week in March of 1953. My question at this moment is to ask this witness whether he knows the reason why that wasn't done.

Mr. Crosby: I submit, your Honor, that it is a leading question and it's improper rebuttal.

The Court: I do not see any reason why it would not be proper for him to state the reason why his concern did not do this, that or the other thing.

Mr. Shapro: That's what I'm asking him, or trying to.

The Court: The objection is overruled. Read the question so the witness will have it clearly in his mind.

(The reporter read the question as follows:

("Q. Do you know, and if you will please answer the question yes or no, as the case may be, do you know of your own knowledge why, between the due date of the Bellingham Coal Mines note, which was November 18, 1952, and

(Testimony of Edwin J. Barshell.)

the first week in March of 1953, no demands were made by Western Machinery Company upon [243] Northwestern Improvement Company for the payment of any moneys on account of this coal washing plant?")

The Court: Yes or no, please.

A. Yes.

Q. (By Mr. Shapro): Will you give the Court that reason?

Mr. Crosby: I object to the question, your Honor, as the answer would be entirely self-serving. It has only to do with the plaintiff's internal policy and is entirely self-serving. It is an improper question.

The Court: Mr. Shapro, what is there that has been developed as a part of defendant's case not previously gone into by plaintiff which inspires this particular question?

Mr. Shapro: The thing that inspires it, the testimony, your Honor, that inspires this question is what I referred to a few moments ago, the testimony of Mr. McMillan that Northwestern Improvement Company received no demands whatever after the note was given until he met me in San Francisco in the first week in March of 1953, and I want to show by this witness in rebuttal the reason why no such demands were made. I think that is perfectly proper rebuttal. [244]

The Court: I will hear from opposing Counsel.

Mr. Crosby: Your Honor, I feel the only type of rebuttal that would be proper is if they denied

such a fact and not as to why such a fact is true.

The Court: The objection is overruled.

A. The reason why no demand was made upon Northwestern Improvement was our knowledge of the solvency of Northwestern Improvement, the fact that we had the order from Northwestern Improvement upon which we relied for the collection of the account, and a business reason: The Northwestern Improvement was a large user of coal washing equipment and we did not wish to embarrass them.

Q. (By Mr. Shapro): Mr. Barshell, do you recall the conversation that you had by telephone with Mr. Little some few days or so before you received the note from him with his letter of August 23rd? A. I do, very well, Mr. Shapro.

Q. Will you tell the Court, please, the circumstances of that call? First, who made it and where you were, where he was and what happened.

A. It is my recollection that Mr. Little called me with regard to the account.

Q. Will you give the Court substantially what he said and [245] what you said in that telephone conversation?

A. The question of a contract of conditional sale or a chattel mortgage was brought up.

Q. By whom? A. By Mr. Little.

Q. What did he say about it?

A. It was in connection with the fact that a chattel mortgage or a contract of conditional sale

(Testimony of Edwin J. Barshell.)

would be embarrassing by reason of an application for an R. F. C. loan. A note was suggested.

Q. By whom? A. I believe by Mr. Little.

Q. All right.

A. And I told Mr. Little that I would accept the note.

Q. Was there anything in that conversation concerning the release of Northwestern Improvement Company?

A. There was never anything said about releasing Northwestern Improvement Company.

Q. Was there anything said, Mr. Barshell, by Mr. Little or by you in connection with this matter concerning Northwestern Improvement Company?

Mr. Crosby: I object to that question as being leading.

The Court: You asked concerning——

Mr. Shapro: Concerning Northwestern [246] Improvement Company.

The Court: The objection is overruled.

A. There was nothing said about or concerning Northwestern Improvement Company.

Mr. Shapro: Your Honor, we have almost reached the end of the case. Could we have a couple of moments to confer?

The Court: Yes, you may.

Mr. Shapro: Thank you.

(Brief pause.)

Mr. Shapro: I have no further questions of this witness, your Honor.

(Testimony of Edwin J. Barshell.)

Cross-Examination

By Mr. Crosby:

Q. Mr. Barshell, it is true, isn't it, that prior to your telephone conversation with Mr. Little where you agreed to accept a note that the Western Machinery Company either through yourself or some other representative requested that the Bellingham Coal Mines Company give a conditional sale agreement or a mortgage covering the equipment which was shipped to the Bellingham Coal Mines Company?

A. It was not done by me prior to that conversation.

Q. Well, during that conversation? [247]

A. No, I thought you said prior to that time I talked to Mr. Little.

Q. At any time. At any time, Mr. Barshell, did you or any representative of the Western Machinery Company request a conditional sales contract or mortgage from Bellingham Coal Mines Company covering the machinery which was delivered to Bellingham?

A. There may have been, Mr. Crosby. I believe there was.

Q. Now, in connection with a chattel mortgage, isn't it true that you would also have had to take a promissory note which would be covered by the chattel mortgage?

Mr. Shapro: I object to that, if your Honor

(Testimony of Edwin J. Barshell.)

please, on the grounds it's calling for the opinion and conclusion of the witness.

The Court: The objection is overruled.

A. I may be wrong but I have seen chattel mortgages that didn't have notes attached.

Q. (By Mr. Crosby): The Western Machinery Company was wanting collateral, additional collateral to place with its bank, the American Trust Company, wasn't it?

A. May I say here that the American Trust Company did not need the obligation reflected by a chattel mortgage or a note to obtain funds from the American Trust Company?

The Court: Whom do you mean?

A. For the Western Machinery Company [248] to obtain collateral for use at the bank.

Mr. Crosby: I have no further questions.

## Redirect Examination

By Mr. Shapro:

Q. Mr. Barshell, did the cash or capital position of Western Machinery Company in August of 1952 require collateral or the immediate security for this obligation or account of Northwestern Improvement Company?

A. It did not then and it does not now.

Mr. Shapro: I have no further questions.

The Court: Anything else?

Mr. Crosby: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Do both sides rest?

Mr. Shapro: Your Honor, I have three documents, three letters that I would like to have marked. I think Counsel will stipulate that they may be received in evidence.

The Clerk: Plaintiff's Exhibits 9, 10 and 11.

(Letter, dated August 19, 1953, from Herbert S. Little to Arthur P. Shapro, was marked Plaintiff's Exhibit No. 9 for [249] identification.)

(Copy of letter, dated August 13, 1953, from Arthur P. Shapro to Herbert S. Little, was marked Plaintiff's Exhibit No. 10 for identification.)

(Letter, dated April 6, 1953, from Shapro & Rothschild to Northwestern Improvement Co., and copy of letter, dated April 6, 1953, from Shapro & Rothschild to Herbert S. Little, was marked Plaintiff's Exhibit No. 11 for identification.)

Mr. Shapro: Your Honor, Counsel for the defendant will, I understand, stipulate to the fact that the original of a letter from me, dated April 6th, addressed to Northwestern Improvement Company, together with the enclosed copy of a letter of even date, April 6, '53, to Messrs. Little, LeSourd, Palmer & Scott, was received by Northwestern Improvement Company. Is that correct?

Mr. Crosby: That is correct.

Mr. Shapro: At this time then we offer in evidence as part of the plaintiff's case in rebuttal the letters marked Plaintiff's Exhibit No. 11 for identification.

The Court: Is that the right one that you mentioned? Did you see it, Mr. Crosby, and is that the right one? Is that the right exhibit? [250]

Mr. Crosby: That is the right exhibit, your Honor.

The Court: It is admitted——

Mr. Crosby: Your Honor——

The Court: Do you have an objection?

Mr. Crosby: I was stipulating to the fact that the letter was received by the Northwestern Improvement Company, but not as to its admissibility, your Honor.

The Court: What is your objection to it?

Mr. Crosby: The letter which is marked Plaintiff's Exhibit 11 from Mr. Shapro to Northwestern Improvement Company purports to state the position of the Western Machinery Company in connection with the promissory note which had been delivered by Bellingham Coal Mines Company several months prior to the sending of this letter, and, therefore, it is immaterial as to Western Machinery Company's position at the time of April the 6th on that note which was given to Western Machinery Company many months prior to that time.

The Court: Did your client respond to it?

Mr. Shapro: They did not, your Honor.

Mr. Crosby: Well, now, I do not know at the present time.

The Court: You are not admitting that. I [251] thought maybe you might have a letter, though, and if you had you might wish to——

Mr. Crosby: Your Honor, I will check for just a moment and——

The Court: You don't need to do that. I just thought you might have at your hand the answer to the letter.

Mr. Crosby: It may be, your Honor, if I may have a second to check my file.

The Court: The Court will suspend ruling, but every minute you take now will be taken away from the time for argument.

(Brief pause.)

Mr. Crosby: I'm not able to state positively one way or the other, your Honor.

Mr. Shapro: I submit, your Honor, in support of its admissibility it is in effect a demand, a renewed demand for payment of the account of Northwestern Improvement Company.

The Court: The Court will not consider any argument in the letter. It will only be for the purpose of showing an act done. The Court will consider no attorney's arguments.

Mr. Shapro: It wasn't offered for that purpose, your Honor. [252]

The Court: That exhibit is admitted, the objections being overruled.

(Plaintiff's Exhibit No. 11 for identification was admitted in evidence.)

Mr. Shapro: And I understand, your Honor, that Counsel for the defendant will stipulate that his client, Northwestern Improvement Company, received a copy of a letter from me to Messrs. Little, LeSourd, Palmer & Scott, dated August 13, 1953, which has been marked Plaintiff's Exhibit 10 for identification.

The Court: Have you seen these before, Mr. Crosby?

Mr. Crosby: Yes, your Honor, I have.

The Court: And did you know that he intended on certain conditions to make use of them in the trial?

Mr. Crosby: Yes, your Honor, and I advised him at that time that I would object to the admissibility of the letters. Your Honor, in connection with Plaintiff's Exhibit 10, I object to the admissibility of this letter on the grounds that it is correspondence between Mr. Shapro and a third party who is not a party to this lawsuit; that it can have no effect upon the defendant in this case. It is true that a copy was received by the defendant, but it is correspondence between Mr. Shapro and a third party and there was no [253] duty upon the defendant in this case to do anything as the result of receiving a copy of correspondence to another party.

Mr. Shapro: It is not offered to show any lack of duty or the failure to perform any duty, it is offered solely for the purpose of showing that the

defendant was advised of the position we were taking with respect to this claim on August 13, 1953.

The Court: The objection is sustained and that offer is rejected.

(Plaintiff's Exhibit No. 10 for identification was refused.)

Mr. Shapro: Then before offering Plaintiff's Exhibit No. 9, as an adverse witness the plaintiff recalls Mr. McMillan.

The Court: Mr. McMillan is called as an adverse witness in rebuttal. You have already been sworn. You may take the stand, Mr. McMillan.

EARL R. McMILLAN

recalled as an adverse witness by plaintiff, having been previously duly sworn, was examined and testified further in rebuttal as follows:

Direct Examination

By Mr. Shapro:

Q. Mr. McMillan, on or about August 13, 1953, do you recall [254] having any telephone or personal conversation with Mr. Little concerning a letter of mine of that date?

A. I have no recollection at this moment, no, sir.

Q. Do you recall at any time in the month of August, 1953, requesting Mr. Herbert S. Little to ask that any action by Western Machinery Company against Northwestern Improvement Company

(Testimony of Earl R. McMillan.)

in this case be postponed until your return? You were then starting on a trip.

A. I don't—I'm not familiar with the subject of your letter. I don't know what you're talking about.

Mr. Shapro: May the letter, marked Plaintiff's Exhibit No. 9, be shown to the witness, your Honor?

The Court: It may be.

(Plaintiff's Exhibit No. 9 for identification was handed the witness.)

Q. (By Mr. Shapro): Mr. McMillan.

A. Yes, sir.

Q. Having read the letter which has been marked for identification Plaintiff's Exhibit No. 9, is your recollection or memory refreshed with respect to any such conversation as I have just interrogated you concerning?

A. Yes, sir, I have some recollection of that.

Mr. Shapro: May the witness be shown. [255] Plaintiff's Exhibit 10, your Honor, the one that was just rejected?

The Court: He may.

(The exhibit was handed the witness.)

The Court: I suggest to Counsel on both sides that you do everything you can to expedite this case. We have to finish this case by 4:00 o'clock, arguments and all.

Mr. Shapro: Yes, your Honor.

(Testimony of Earl R. McMillan.)

Q. (By Mr. Shapro): Mr. McMillan, will you read Exhibit 10, please?

(Brief pause.)

Q. Mr. McMillan, was the substance of the letter which is marked Plaintiff's Exhibit 10 discussed with you at or about the date of that letter by Mr. Little?

A. I have no recollection of any discussion of this subject matter.

Q. You have no recollection of any discussion?

A. No, sir.

Q. Do you have any recollection of the discussion that is referred to in Exhibit No. 9?

A. Yes, sir.

Q. But it did not so far as you recall concern the letter of August 13th, which is No. 10?

A. I do not connect them, no, sir. [256]

Q. I see.

Mr. Shapro: Now, may the witness be shown just one more item, your Honor, Plaintiff's Exhibit No. 2?

The Court: He may.

(The exhibit was handed the witness.)

Q. (By Mr. Shapro): Would you read, Mr. McMillan, the second paragraph of Plaintiff's Exhibit No. 2, beginning with the words, "As you know"?

(Brief pause.)

(Testimony of Earl R. McMillan.)

A. Yes, sir.

Q. If, as you testified this morning, you told Mr. Huckaba that your signing for Northwestern Improvement Company, Plaintiff's Exhibit 1, the quotation and order, was subject to the understanding that the bill would be paid by Bellingham Coal Mines Company, why didn't you so qualify your confirmation of that letter in your letter of February 25, 1952?

A. That certainly was my intention in writing that letter as I did.

Q. But, by reading the letter, you don't find any such qualification, do you, sir?

A. I certainly do.

Q. A qualification as to the liability? Show it to me, sir, or show it to the court, rather. [257]

A. I start off by saying "As you know," which he did know.

Q. All right.

A. "* * * this equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager, and as such has been duly authorized by the former to purchase this equipment."

Q. Read on, please.

A. "This arrangement, of course, makes unnecessary any investigation on your part as to the financial responsibility of the Bellingham Coal Mines Company, which as you know is a newly organized corporation. I might add, however, for your infor-

(Testimony of Earl R. McMillan.)

mation, that the latter company is adequately financed and fully responsible for any commitments they make make at this time."

Q. When you wrote that letter——

The Court: Who was the latter company?

A. Beg your pardon, sir?

The Court: Who was the latter company?

Mr. Shapro: The Bellingham Coal Mines Company.

The Witness: The Bellingham Coal Mines Company. [258]

Q. (By Mr. Shapro): When you wrote that letter which is Plaintiff's Exhibit No. 2 and particularly the part that you have just read to the Court, Mr. McMillan, isn't it a fact that you knew and that you intended by that letter to pledge the credit of Northwestern Improvement Company to Western Machinery Company?

A. Absolutely no, sir.

Mr. Shapro: That's all.

Mr. Crosby: I have no further questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Shapro: May I at this time, your Honor, offer in evidence Plaintiff's Exhibit No. 9? That is the letter that the witness McMillan said he recognized the contents of.

Mr. Crosby: Your Honor, I object to that letter on the same ground as Plaintiff's Exhibit No. 10

which was rejected. The letter is from Mr. Little, a person who is not a party to this action, to Mr. Shapro, and that the defendant can in no way be bound by the contents of that letter. It is not written on behalf of them, and it has no material bearing on the issues in this case.

Mr. Shapro: It quotes Mr. McMillan, your [259] Honor. It quotes Mr. McMillan, and Mr. McMillan identified the fact that he was familiar with that transaction.

The Court: Was this brought to Mr. McMillan's attention?

Mr. Shapro: Yes, when he was on the stand, your Honor.

The Court: No, I mean before he was on the stand.

Mr. Shapro: No, not before he was on the stand, your Honor, no it was not.

The Court: I am inclined to think that the objection to this is well taken. It is finally the opinion of the Court that if that was not brought to Mr. McMillan's attention that he is not bound by it and should not have to be confronted with it at this time when he is acting in the capacity of a witness, even though he was as important an actor as he was in the transactions involved here. The objections are sustained to Plaintiff's Exhibit 9 and the offer of it is rejected.

(Plaintiff's Exhibit No. 9 for identification was refused.)

Mr. Shapro: The plaintiff's rebuttal is closed, your Honor. [260]

The Court: Does the plaintiff rest?

Mr. Shapro: Yes, your Honor.

The Court: Does the defendant rest?

Mr. Crosby: Yes, your Honor.

Mr. Shapro: Your Honor, so that Counsel will be informed, the plaintiff will waive the opening argument.

The Court: Very well. Court will be at recess for approximately five minutes.

(Short recess.)

The Court: All are present. You may proceed.

Mr. Crosby: Your Honor, after your Honor left the bench we advised the clerk that we felt that we would each like to have a minimum of one hour to argue the case and——

The Court: I am sorry, I can't give you but thirty minutes. You may proceed to argue. I am very sorry. We have been at this case all week, you should have saved some time for argument. You may select as much of the time as you wish for rebuttal of your thirty minutes. I have to stop the argument at four o'clock.

Mr. Shapro: Your Honor, the plaintiff waives its opening argument.

The Court: You may proceed, Mr. Crosby. [261]

(Thereupon, Mr. Crosby presented oral argument to the Court in behalf of defendant, followed by oral argument by Mr. Shapro in behalf of plaintiff.) [262]

* * *

Reporter's Certificate

I, George F. Cropp, do hereby certify that I am an Official Court Reporter for the above-entitled Court, and that as such was in attendance upon and reported the hearing of the foregoing matter.

I further certify that the foregoing transcript is a true and correct record of the proceedings had upon the hearing of said cause.

Dated at Seattle, Washington, this 25th day of July, 1956.

/s/ GEORGE F. CROPP,
Official Court Reporter.

[Endorsed]: Filed August 10, 1956. [263]

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[Title of District Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 75(o) of the Federal Rules of Civil Procedure and designation of counsel, I am transmitting herewith, the following original papers in the file dealing with the action together with exhibits as the

record on appeal herein to the United States Court of Appeals at San Francisco, to wit:

1. Complaint, filed Feb. 9, 1955.

2. Marshal's return on summons, filed Feb. 15, 1955.

3. Answer of defendant, filed Feb. 28, 1955.

4. Motion of defendant to amend answer, filed April 3, 1956.

5. Affidavit of Roger J. Crosby, filed April 3, 1956.

6. Motion of defendant for Production of Documents, filed April 3, 1956.

7. Notice of Association of Counsel, filed April 9, 1956.

8. Supplement of defendant to Motion for Production of Documents, filed April 9, 1956.

9. Notice of Plaintiff's Taking of Deposition Upon Oral Examination of Earl McMillan, filed April 12, 1956.

10. Praecipe, for subpoenas duces tecum, Northwestern Improvement Co. and 3, filed April 12, 1956.

11. Stipulation for Amended Answer, etc., filed April 12, 1956.

12. Amended Answer of Defendant, filed April 12, 1956.

13. Deposition of L. W. T. May on behalf of defendant, filed April 14, 1956. (Exhibits 1 through 7 inclusive)

14. Marshal's return on subpoenas duces tecum, Dean Eastman and 2, filed April 20, 1956.

15. Marshal's return on deposition subpoena

duces tecum, Northern Pacific Railway, filed April 20, 1956.

16. Motion of defendant to Amend Answer, filed May 22, 1956.

17. Affidavit of Roger J. Crosby, filed May 22, 1956.

18. Order Denying Defendant's Motion to File Second Amended Answer, filed May 31, 1956.

19. Plaintiff's Memorandum of Authorities, filed June 15, 1956.

20. Defendant's Memorandum of Authorities, filed June 15, 1956.

21. Findings of Fact and Conclusions of Law, filed June 22, 1956.

22. Oral Opinion of Court for June 15, 1956, filed June 25, 1956.

23. Judgment, filed June 22, 1956.

24. Notice of Appeal, filed July 16, 1956.

25. Cost Bond on Appeal, filed July 16, 1956.

26. Order Directing Transmission of Original Exhibits, filed July 20, 1956.

27. Designation of Record on Appeal, filed July 20, 1956.

Plaintiff's Exhibits 1 through 11, inclusive.

Defendant's Exhibits A-1 through A-19, inclusive.

28. Statement of Facts (Court Reporter's Transcript of Proceedings) filed Aug. 10, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the

appellant for preparation of the record on appeal in this cause, to wit:

Notice of Appeal, $5.00; and that said amount has been paid to me by the attorneys for the appellant.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle this 16th day of August, 1956.

[Seal] MILLARD P. THOMAS, Clerk;

By /s/ TRUMAN EGGER, Chief Deputy.

---

[Endorsed]: No. 15238. United States Court of Appeals for the Ninth Circuit. Western Machinery Company, a Corporation, Appellant, vs. Northwestern Improvement Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed August 17, 1956.

Docketed: August 22, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15238

WESTERN MACHINERY COMPANY, a Corporation,

Appellant,

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a Corporation,

Appellee.

## STATEMENT OF POINTS ON WHICH APPELLANT RELIES

Statement of points on which appellant relies:

1. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"II.

"That plaintiff sold and delivered coal-wash-machinery to Bellingham Coal Mines Company for use in its coal mine at Bellingham, Washington, upon a written price quotation dated February 20, 1952, from plaintiff, signed by defendant, introduced in evidence as Plaintiff's Exhibit Number 1, and a written acceptance dated February 25, 1952, from the defendant, Northwestern Improvement Company, as the operating manager of Bellingham Coal Mines Company, which acceptance was introduced in

> evidence as Plaintiff's Exhibit Number 2. That even though said quotation of February 20, 1952, and the acceptance of February 25, 1952, were in defendant's name, plaintiff at all times knew, as explained in Exhibit Number 2, that said coal-washing plant was for the use of Bellingham Coal Mines Company and that Bellingham Coal Mines Company would receive the entire benefit of said coal-washing plant."

Instead of finding II, the district court should have found under the evidence that defendant purchased the coal-washing machinery on its own account.

2. Error of the district court in making the following finding of fact which the evidence before the court does not support:

> "III.
>
> "That by said quotation dated February 20, 1952, and said acceptance dated February 25, 1952, the defendant, to expedite the delivery of said coal-washing plant to Bellingham Coal Mines Company, as purchaser, lent its name for credit purposes only and thereby became a surety for Bellingham Coal Mines Company to pay for the purchase price of said coal-washing plant as shown on Exhibits 1 and 2."

Instead of said finding, the district court should have found under the evidence that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff, as purchaser and not as surety, to pay the purchase price.

3. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"IV.

"That the defendant did not have any agreement with said Bellingham Coal Mines Company to receive, nor did defendant receive, any money or other consideration as a result of the purchase of said coal-washing plant or for the act of becoming a surety for said Bellingham Coal Mines Company in the purchase of said plant. Defendant's assumption of liability for the purchase price of said coal-washing plant delivered to Bellingham Coal Mines Company in accordance with Plaintiff's Exhibits 1 and 2 was without consideration to defendant."

Instead of said finding, the district court should have found that defendant received consideration as purchaser of the coal-washing plant or that if Bellingham Coal Mines Co. was purchaser of said coal-washing plant that defendant became surety, sharing, however, in the consideration running to Bellingham Coal Mines Co. and also receiving an independent consideration.

4. Error of the district court in making the following finding of fact which the evidence before the court does not support, except those portions specifying the original purchase price, the dates and amounts of payments, the payor, payee, and the unpaid balance, which are correct and in accordance with the evidence:

"V.

"That by reason of the purchase and sale of said coal-washing plant, the Bellingham Coal Mines Company became indebted to plaintiff in the sum of $71,038.71, for which amount defendant was surety; that said account was due and payable on or before the 31st day of July, 1952; that on or about August 15, 1952, Bellingham Coal Mines Company paid $15,000.00 to plaintiff in reduction of the account for which defendant was surety. That subsequent to November 18, 1952, Bellingham Coal Mines Company paid on the obligation for which defendant was surety, the additional sum of $7,593.24, leaving $48,445.47 unpaid."

Instead of the objectionable portions of said finding, the district court should have found that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff as purchaser and not as surety; and further that said account was not due and payable until the installation of the coal-washing plant was completed and accepted.

5. Error of the district court in making the following portion of finding VI which the evidence before the court does not support:

"* * * The Court finds that no additional consideration in fact was paid or received by defendant on account of, and the defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note."

Instead of said portion of finding VI, the court should have found that defendant received consideration for the execution of the promissory note by Bellingham Coal Mines Company and its delivery to plaintiff; that the manager of coal operations of defendant had actual and apparent authority to consent to and to approve on behalf of defendant said execution and delivery of said note; that defendant in fact had acutal knowledge of, acquiesced in, consented to and approved said execution and delivery of said note.

6. Error of the district court in making the following portion of finding VII which evidence before the court does not support:

> "* * * that by said promissory note, plaintiff extended to Bellingham Coal Mines Company, without the consent or approval of defendant, the time for payment of the balance due on said coal-washing plant to November 18, 1952."

Instead of said portion of finding VII, the district court should have found that payment of the purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

7. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"II.

"That plaintiff sustained the burden of proof, to the extent that it sold and delivered goods, wares and merchandise of the reasonable value of $71,038.71 to Bellingham Coal Mines Company in accordance with Plaintiff's Exhibits 1, 2 and 4, for which defendant became a surety to plaintiff for the sum of $71,038.71; that there is presently due and owing $48,445.47 of the amount for which defendant was surety."

Instead of said conclusion, the district court should have entered its conclusion of law that the plaintiff sustained the burden of proving that it sold goods, wares and merchandise of the agreed and reasonable value of $71,038.71 to defendant, and that defendant is presently indebted to plaintiff in the amount of $48,445.47.

8. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"III.

"That defendant was a surety for Bellingham Coal Mines Company, and Bellingham Coal Mines Company was the principal, in the purchase of a coal-washing plant by said Bellingham Coal Mines Company from plaintiff on or about February 25, 1952."

9. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"IV.

"That defendant sustained the burden of proof under its first affirmative defense to both first and second counts of plaintiff's complaint; that defendant did not, nor was defendant entitled to, receive any consideration for the assumption of liability as a result of the purchase by Bellingham Coal Mines Company of said coal-washing plant from plaintiff."

Instead of said conclusion, the district court should have entered its conclusion of law that if in fact defendant was a surety, it shared in the consideration running to Bellingham Coal Mines Company and also received an independent consideration therefor.

10. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"VI.

"That defendant has sustained the burden of proof as to its fourth affirmative defense to both first and second counts of plaintiff's complaint. That by a valid agreement, plaintiff, without reserving any rights it may have had against defendant, extended to defendant's principal, Bellingham Coal Mines Company, the time for payment of the balance due on the purchase of said coal-washing plant, for which obligation

> defendant was a surety, thereby discharging the defendant from its obligation as surety."

Instead of said conclusion, the district court should have entered its conclusion of law that payment of the purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

11. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

> "VII.
>
> "That a judgment and decree should be entered herein, dismissing all counts of plaintiff's complaint, with prejudice, and that the defendant is entitled to have a judgment against the plaintiff for its costs and disbursements herein."

Instead of said conclusion, the district court should have entered its conclusion of law that plaintiff is entitled to judgment against defendant in the amount of $48,445.47, and for its costs and disbursements.

12. Error of the district court in entering judgment dismissing all counts of plaintiff's complaint with prejudice and with costs to defendant. Instead thereof, the district court should have rendered judgment for plaintiff against defendant in the amount of $48,445.47 plus legal interest and for plaintiff's costs and disbursements incurred.

Dated this 22nd day of August, 1956.

SHAPRO & ROTHSCHILD and

KARR, TUTTLE &
CAMPBELL,
Attorneys for Appellant.

By /s/ CARL G. KOCH,

By /s/ HOWARD I. TUTTLE.

Receipt of copy acknowledged.

[Endorsed]: Filed August 24, 1956.

No. 15,238

# United States Court of Appeals

## For the Ninth Circuit

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Western Machinery Company,
a corporation,
*Appellant,*

vs.

Northwestern Improvement Co.,
a corporation,
*Appellee.*

---

**Appeal from the United States District Court for the Western District of Washington, Northern Division. Honorable John C. Bowen, Judge.**

## APPELLANT'S OPENING BRIEF.

---

Shapro & Rothschild,
Arthur P. Shapro,
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Carl G. Koch,
Coleman P. Hall,
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No. 15,238

# United States Court of Appeals
## For the Ninth Circuit

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| | |
|---|---|
| WESTERN MACHINERY COMPANY, a corporation, *Appellant*, vs. NORTHWESTERN IMPROVEMENT CO., a corporation, *Appellee*. | |

**Appeal from the United States District Court for the Western District of Washington, Northern Division.**

**Honorable John C. Bowen, Judge.**

## APPELLANT'S OPENING BRIEF.

---

I.

### STATEMENT DISCLOSING JURISDICTION.

The United States District Court for the Western District of Washington, Northern Division, the trial court, had jurisdiction of this cause by virtue of authority granted by the Congress of the United States in Chapter 646, 62. Stat. 930; 28 U.S.C.A., Sec. 1332. The complaint of appellant (R. 3) and the amended answer of appellee (R. 5) disclose appellant

to be a corporation organized under the laws of and a citizen of the State of Utah, appellee to be a corporation organized under the laws of and a citizen of the State of Delaware, and the matter in controversy to exceed the sum of $3,000.00, exclusive of interest and costs.

This appeal is from a final judgment rendered in the United States District Court for the Western District of Washington, Northern Division, against appellant (R. 22). This court has jurisdiction to review such judgment by virtue of Chapter 655, 65 Stat. 726; 28 U.S.C.A., Sec. 1291.

---

## II.

### STATEMENT OF THE CASE.

Appellant, Western Machinery Company, is a corporation engaged in the business of manufacturing and selling mining machinery and equipment. Appellee, Northwestern Improvement Co., is a whollyowned subsidiary corporation of the Northern Pacific Railroad. Bellingham Coal Mines Company is a corporation engaged in the mining, processing and marketing of coal from its mine located at Bellingham, Washington.

Sometime prior to 1952, Bellingham Coal Mines Company and Earl R. McMillan, on behalf of appellee, negotiated and entered into an agreement whereby appellee was to operate Bellingham's coal mine. By this agreement appellee was to rehabilitate, manage

and operate the coal mine, to furnish from appellee's own employees such management and operating personnel as was required, and to furnish such supplies and equipment as appellee might conveniently be able to supply. In exchange therefor Bellingham Coal Mines Company agreed to reimburse appellee for all costs and expenses incurred by appellee in connection therewith, and in addition to pay to appellee a fixed fee of twenty per cent thereof.

The operation of the coal mine was under the direct and personal supervision of Mr. McMillan, who became General Manager, Vice President and a director of Bellingham Coal Mines Company. Mr. McMillan was at the same time manager of appellee's coal operations, being the only official of Northwestern Improvement Co. located in the State of Washington.

Early in 1952, J. Stanley Huckaba, then one of appellant's sales representatives, and Mr. McMillan entered into negotiations for the sale by appellant of a coal washing plant to be installed at the coal mine site. On February 20, 1952, a written price quotation was submitted by Mr. Huckaba to Northwestern Improvement Co. This quotation was accepted and signed "Northwestern Improvement Co., Earl R. McMillan, Manager of Coal Operations" (Plf. Ex. 1). A few days later Mr. McMillan, on behalf of and on the letterhead of appellee, confirmed the order (Plf. Ex. 2). From time to time as components of the coal washing plant were shipped appellant sent bills therefor to appellee which were received by Mr. McMillan. As installation neared completion, Mr. McMillan and rep-

resentatives of appellant discussed arrangements for payment of the purchase price (R. 146-148). Thereafter through arrangements made by Mr. McMillan, appellant received $15,000.00 from Bellingham Coal Mines Company to apply on the purchase price of the machinery. The installation was completed August 22, 1952, and the installation and operation were certified satisfactory by Mr. McMillan August 29, 1952 (Def. Ex. A-14). A final bill was sent to and approved by appellee on or about August 15, 1952 (Def. Ex. A-4).

On or about August 23, 1952 (Find. VII, R. 12), one day after completion of installation of the coal washing plant, appellant received from Bellingham Coal Mines Company its promissory note (Def. Ex. A-6) in an amount equal to the balance of the purchase price for the coal washing plant. Before its delivery, the note was approved by Mr. McMillan and its delivery to appellant authorized by him. The note by its terms payable at any time on or before November 18, 1952, was not paid. This action was brought against Northwestern Improvement Co. February 9, 1955, to recover the balance of the purchase price of the coal washing plant. Judgment was rendered against appellant dismissing this action with prejudice. After trial the district court was of the opinion that Bellingham Coal Mines Company was the purchaser of the machinery and appellee a surety only. The court found the unpaid balance to be $48,445.47, but it was of the further opinion that appellant had been discharged by operation of law when Bellingham Coal Mines Company issued its note to appellant.

This appeal involves the following questions:

1. Can the terms of this written contract between the parties be varied by parol evidence?

2. Was appellee a principal debtor for the purchase price of the coal washing plant?

3. Did appellant know that appellee was a surety?

4. If not a principal debtor, was appellee a compensated or voluntary surety?

5. Was there an extention of time?

6. Was there a binding agreement between appellant and Bellingham Coal Mines Company extending the time for payment of the purchase price of the coal washing plant?

7. Did appellee consent to the extension of time, if any?

8. Is appellee estopped to deny its consent to the extension of time, if any?

9. Did appellee sustain the burden of proving its Affirmative Defenses I and IV?

These questions are raised by the pleadings, by appropriate and timely objections during trial, by appellant's statement of points (R. 255), and by the following specifications of errors.

---

## III.

### SPECIFICATION OF ERRORS.

1. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"II

That plaintiff sold and delivered coal-washing machinery to Bellingham Coal Mines Company for use in its coal mine at Bellingham, Washington, upon a written price quotation dated February 20, 1952, from plaintiff, signed by defendant, introduced in evidence as plaintiff's Exhibit Number 1, and a written acceptance dated February 25, 1952, from the defendant, Northwestern Improvement Company, as the operating manager of Bellingham Coal Mines Company, which acceptance was introduced in evidence as plaintiff's Exhibit Number 2. That even though said quotation of February 20, 1952, and the acceptance of February 25, 1952, were in defendant's name, plaintiff at all times knew, as explained in Exhibit Number 2, that said coal-washing plant was for the use of Bellingham Coal Mines Company and that Bellingham Coal Mines Company would receive the entire benefit of said coal-washing plant."

Instead of finding II, the district court should have found under the evidence that defendant purchased the coal washing wachinery on its own account.

2. Error of the district court in making the following finding of fact which the evidence before the court does not support:

"III

That by said quotation dated February 20, 1952, and said acceptance dated February 25, 1952, the defendant, to expedite the delivery of said coal-washing plant to Bellingham Coal Mines Company, as purchaser, lent its name for credit

> purposes only and thereby became a surety for Bellingham Coal Mines Company to pay for the purchase price of said coal-washing plant as shown on Exhibits 1 and 2."

Instead of said finding, the district court should have found under the evidence that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff as purchaser and not as surety, to pay the purchase price.

3. (a) On cross-examination of Mr. Huckaba, Mr. Roger J. Crosby, attorney for appellee, propounded a series of questions to elicit from the witness testimony to the effect that appellee and Bellingham Coal Mines Company were separate companies and that the witness had been advised that appellee had been employed by Bellingham Coal Mines Company for management purposes, and that the approval of the board of directors of Bellingham Coal Mines Company was required before the machinery could be purchased (beginning R. 38, 45 and 53). Mr. Arthur P. Shapro, attorney for appellant, objected to the testimony and to defendant's Exhibits 1, 2 and 3 as follows:

> "Mr. Shapro. Your Honor, I object to that question upon the ground that it is incompetent, irrelevant and immaterial and that it is an attempt to violate the parol evidence rule and to vary the terms of a written instrument by parol." (R. 38 and 39.)
>
> Mr. Shapro. Furthermore, since it represents, as he has testified, a part of his report of negotiations leading up to the document which has been

admitted as Plaintiff's Exhibit 1 and also the confirmation, Plaintiff's Exhibit No. 2, and was dated and executed prior to that date, it must as a matter of law be deemed as negotiations merged in the subsequent contract and as such is not admissible." (R. 45, 46.)

Mr. Shapro. To which offer (Def. Ex. A-1 and A-2), your Honor, we object upon the ground that no proper foundation has been laid, and upon the further ground that by the answer of the witness to the question propounded by Counsel that the notes, A-1 and A-2, the reports culminated in the sale which is recorded in Plaintiff's Exhibits 1 and 2, we have the same ground, namely that it was merged in the written instrument of a later date and, therefore, it would be a violation of the parol evidence rule to admit it." (R. 53.)

(b) On direct examination of Mr. Huckaba as appellee's witness, Mr. Crosby propounded a series of questions to elicit from the witness testimony to the effect that appellee signed the contract as surety only (beginning R. 90). Mr. Shapro objected to the testimony and to defendant's Exhibits A-1, A-2, A-3, A-11, A-12 and A-13 as follows:

"Mr. Shapro. I object to the question, if your Honor please, upon the ground it is incompetent, irrelevant and immaterial, doesn't tend to prove or disprove any issue in this case and is hearsay by reason of being merged in Plaintiff's Exhibit 1 which is the subject matter of and to which the witness has already testified was preceded by these previous quotations and negotiations." (R. 90.)

(c) On direct examination of Mr. McMillan, Mr. Crosby propounded a series of questions to elicit testimony regarding negotiations and discussions prior to the date of the contract to the effect that Mr. Huckaba knew that appellee signed the contract as surety only (beginning R. 138) and that the machinery was purchased and paid for by the Bellingham Coal Mines Company (beginning R. 174) Mr. Shapro objected as follows:

> "Mr. Shapro. I object to that question, if your Honor please, on several grounds. The first ground is it's too general, and secondly that if it is intended to elicit any discussions which led up to and were included in the contract of February 20th, that it would be an attempt by parol to vary the terms of a written instrument, and those discussions would be merged in the instrument." (R. 138, 139.)
>
> Mr. Shapro. Your Honor, at this time may I move to strike the words and everything that follows 'with the understanding that' upon the grounds that it is the conclusion of the witness and also that it is an attempt by parol to vary the terms of a written instrument." (R. 174.)

(d) All other testimony of Mr. Huckaba and Mr. McMillan and others exhibits offered by appellee having the effect of varying, adding to or explaining the written contract (Plf. Ex. 1) in violation of the parol evidence rule was objected to, it being understood by the parties and the court that the above quoted objections applied.

4. Error of the district court in making the following finding of fact which the evidence before the court does not support:

> "IV
>
> That the defendant did not have any agreement with said Bellingham Coal Mines Company to receive, nor did defendant receive, any money or other consideration as a result of the purchase of said coal-washing plant or for the act of becoming a surety for said Bellingham Coal Mines Company in the purchase of said plant. Defendant's assumption of liability for the purchase price of said coal-washing plant delivered to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1 and 2 was without consideration to defendant."

Instead of said finding, the district court should have found that defendant received consideration as purchaser of the coal-washing plant or that if Bellingham Coal Mines Company was purchaser of said coal-washing plant that defendant became surety, sharing, however, in the consideration running to Bellingham Coal Mines Company and also receiving an independent consideration.

5. Error of the district court in making the following finding of fact which the evidence before the court does not support, except those portions specifying the original purchase price, the dates and amounts of payments, the payor, payee, and the unpaid balance, which are correct and in accordance with the evidence:

"V

> That by reason of the purchase and sale of said coal-washing plant, the Bellingham Coal Mines Company became indebted to plaintiff in the sum of $71,038.71, for which amount defendant was surety; that said account was due and payable on or before the 31st day of July, 1952; that on or about August 15, 1952, Bellingham Coal Mines Company paid $15,000.00 to plaintiff in reduction of the account for which defendant was surety. That subsequent to November 18, 1952, Bellingham Coal Mines Company paid on the obligation for which defendant was surety, the additional sum of $7,593.24, leaving $48,445.47 unpaid."

Instead of the objectionable portions of said finding, the district court should have found that defendant was the purchaser of the coal-washing plant on its own account and became obligated to plaintiff as purchaser and not as surety; and further that said account was not due and payable until the installation of the coal-washing plant was completed and accepted.

6. Error of the district court in making the following portion of finding VI which the evidence before the court does not support:

> ". . . The Court finds that no additional consideration in fact was paid or received by defendant on account of, and the defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note."

Instead of said portion of finding VI, the court should have found that defendant received consideration for

the execution of the promissory note by Bellingham Coal Mines Company and its delivery to plaintiff; that the manager of coal operations of defendant had actual and apparent authority to consent to and approve on behalf of defendant said execution and delivery of said note; that defendant in fact had actual knowledge of, acquiesced in, consented to and approved said execution and delivery of said note.

7. Error of the district court in making the following portion of finding VII which evidence before the court does not support:

> ". . . that by said promissory note, plaintiff extended to Bellingham Coal Mines Company without the consent or approval of defendant, the time for payment of the balance due on said coal-washing plant to November 18, 1952."

Instead of said portion of finding VII, the district court should have found that payment of the purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

8. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"II

That plaintiff sustained the burden of proof, to the extent that it sold and delivered goods, wares and merchandise of the reasonable value of $71,038.71 to Bellingham Coal Mines Company in accordance with plaintiff's Exhibits 1, 2 and 4, for which defendant became a surety to plaintiff for the sum of $71,038.71; that there is presently due and owing $48,445.47 of the amount for which defendant was surety."

Instead of such conclusion, the district court should have entered its conclusion of law that the plaintiff sustained the burden of proving that it sold goods, wares and merchandise of the agreed and reasonable value of $71,038.71 to defendant, and that defendant is presently indebted to plaintiff in the amount of $48,445.47.

9. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"III

That defendant was a surety for Bellingham Coal Mines Company, and Bellingham Coal Mines Company was the principal, in the purchase of a coal-washing plant by said Bellingham Coal Mines Company from plaintiff on or about February 25, 1952."

10. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"IV

That defendant sustained the burden of proof under its first affirmative defense to both first and second counts of plaintiff's complaint; that defendant did not, nor was defendant entitled to, receive any consideration for the assumption of liability as a result of the purchase by Bellingham Coal Mines Company of said coal-washing plant from plaintiff."

Instead of said conclusion, the district court should have entered its conclusion of law that if in fact defendant was a surety, it shared in the consideration running to Bellingham Coal Mines Company and also received an independent consideration therefor.

11. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

"VI

That defendant has sustained the burden of proof as to its fourth affirmative defense to both first and second counts of plaintiff's complaint. That by a valid agreement, plaintiff, without reserving any rights it may have had against defendant, extended to defendant's principal, Bellingham Coal Mines Company, the time for payment of the balance due on the purchase of said coal-washing plant, for which obligation defendant was a surety, thereby discharging the defendant from its obligation as surety."

Instead of said conclusion, the district court should have entered its conclusion of law that payment of the

purchase price was not due until completion and acceptance of the coal-washing plant; that even if due, the execution and delivery of the promissory note by Bellingham Coal Mines Company did not constitute a binding contract extending the time of payment of the purchase price; and that even if there was a binding contract extending the time of payment, defendant had knowledge of, acquiesced in, consented to and approved said extension of time.

12. Error of the district court in making the following conclusion of law which the evidence and facts do not support:

> "VII
>
> That a judgment and decree should be entered herein, dismissing all counts of plaintiff's complaint, with prejudice, and that the defendant is entitled to have a judgment against the plaintiff for its costs and disbursements herein."

Instead of said conclusion, the district court should have entered its conclusion of law that plaintiff is entitled to judgment against defendant in the amount of $48,445.47, plus legal interest, and for its costs and disbursements.

13. Error of the district court in entering judgment dismissing all counts of plaintiff's complaint with prejudice and with costs to defendant. Instead thereof, the district court should have rendered judgment for plaintiff against defendant in the amount of $48,445.47 plus legal interest and for plaintiff's costs and disbursements incurred.

## IV.

### SUMMARY OF ARGUMENT.

A. Parol Evidence is Inadmissible to Vary the Terms of a Contract.

B. Appellee Was a Principal Debtor.

C. Appellee Was Not Discharged, Even if a Surety.

1. Appellant was without knowledge that appellee was a surety.
2. Appellee, if a surety, was a compensated surety.
3. There was no extension of time.
4. There was no binding agreement extending the time for payment.
5. Appellee consented to the extension of time and is estopped to deny its consent.
6. Appellee failed to sustain its burden of proving its affirmative defenses.

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## V.

### ARGUMENT.

#### A. PAROL EVIDENCE IS INADMISSIBLE TO VARY THE TERMS OF A CONTRACT.

The district court obtained jurisdiction as previously noted by virtue of the diversity of citizenship of the parties. In such cases, and in all matters of substantive law, a federal court is required to follow

and apply the state law. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 82 L. Ed. 1188.

The parol evidence rule is not a rule of evidence, but is a rule of substantive law, and since *Erie Railroad Co. v. Tompkins,* this has become the accepted view. *In re United Public Utilities Corporation* (D.C. Delaware) 52 Fed. Supp. 975; *American Crystal Sugar Co. v. Nicholas* (C.C.A. 10) 124 F. 2d 477; *Wigmore on Evidence,* 3rd Edition, Vol. 9, Sec. 2400. The Court of Appeals for the Second Circuit in *Zell v. American Seating Co.,* 138 F. 2d 643, stated:

> "But the federal courts have held, in line with what has become the customary doctrine in most states, that it (the parol evidence rule) is a rule of substantive law. . . ."

The contract upon which this action is based was entered into in the State of Washington and called for performance to be made in the State of Washington, and therefore the substantive laws of this state apply to the construction and interpretation of the contract and all other matters relating to it. The Supreme Court of the State of Washington has announced its construction and application of the parol evidence rule relating to written agreements.

In *Karatofski v. Hampton,* 135 Wash. 139, 237 Pac. 17, the parties entered into a written agreement whereby Industrial Loan & Investment Company contracted to sell timberland to the Orting Lumber Company and to S. W. Hampton and wife. The contract recited that the Orting Lumber Company, Hampton

and wife, and Industrial Loan & Investment Company were the parties. The contract was signed as follows:

> "Industrial Loan & Investment Company, by J. G. Newbegin, Its President. Attest Elva R. Schroder, Its Secretary.
> Orting Lumber Company, by S. Wade Hampton, Its President. Attest W. E. Hampton, Its Secretary.
> S. Wade Hampton. Hildegard Hampton."

Payments as prescribed by the contract were not made and Industrial Loan & Investment Company brought suit against the Hamptons.

The Hamptons claimed as a defense that they signed the original contract as sureties, and upon trial sought to establish by oral testimony that it was the intention of the parties at the time they signed the original agreement that the Hamptons sign as sureties only and not as principals. In holding that parol evidence was inadmissible to show that the Hamptons signed as sureties and not as principals, the court stated:

> "This is out of harmony with the express recital in the contract as above quoted which makes them parties as principals. It is also out of harmony with the legal effect of their signing the contract individually. To hold the appellants could by oral testimony dispute the recital in the contract and the legal effect of their signing individually would be a violation of that rule of evidence which provides that a written contract cannot be varied or modified by oral testimony."

The *Karatofski* case is determinative of the parol evidence issue now before the court. The contract

shows the parties to be appellant and appellee. It is signed by appellant and appellee and by no one else. The instrument is free from ambiguity, and parol evidence to show that appellee signed in some capacity other than as clearly appears on the face of the instrument falls within the ban of the *Karatofski* case.

Appellant made repeated and timely objections to testimony of Mr. Huckaba and Mr. McMillan which was elicited for the purpose of altering the terms of the written contract, by attempting to show that appellee signed the instrument as surety and not as the principal debtor, and that appellant knew it. Exhibits A-1, A-2, A-3, A-4, A-11, A-12 and A-13 were offered by appellee and admitted in violation of the parol evidence rule and over appellant's objection for the purpose of showing that appellant knew that Mr. McMillan had to obtain the approval of the board of directors of Bellingham Coal Mines Company before purchasing the machinery. This testimony was, of course, for the ultimate purpose of going behind the contract to show that Northwestern Improvement Co. was not the purchaser. Likewise, the testimony of Mr. McMillan (R. 174) to the effect that appellee's name was substituted in place of Bellingham Coal Mines Company's name on the contract (Plf. Ex. 1) for credit purposes only, and that the parties understood that Bellingham Coal Mines Company was the purchaser and would pay for the equipment, was for the purpose of showing that appellee was a surety only. All of this testimony and said exhibits should have been excluded from evidence because elicited and

offered for the purpose of showing appellee a surety rather than a principal debtor. The contract was clear and unambiguous and parol evidence to vary its terms was inadmissible and should have been excluded from evidence by the trial court.

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### B. APPELLEE WAS A PRINCIPAL DEBTOR.

The contract for the purchase of machinery (Plf. Ex. 1) was entered into by and between Western Machinery Company as seller and Northwestern Improvement Co. as purchaser; it described sufficiently the property sold and set forth the purchase price; it was signed by Mr. McMillan as Manager of Coal Operations of appellee. The contract is clear and without ambiguity. If appellee intended to become a surety, it would have been simple indeed for it to have signified such intent. It would have been enough were the signature preceded by some words such as "We guarantee payment of this order", or "We agree to pay if Bellingham Coal Mines Company does not", or even had the words "As surety" qualified its signature.

Appellee, however, took none of these precautions. Instead Northwestern Improvement Co. inserted and signed its name as purchaser without reservation or qualification. The name Bellingham Coal Mines Company does not appear in any shape, manner or form on the contract as a contracting party or otherwise.

It appears from the testimony of Mr. Huckaba and Mr. McMillan throughout the record that Mr. Huck-

aba negotiated exclusively with Mr. McMillan. Mr. Huckaba testified that the machinery was sold to Northwestern Improvement Co., the appellee (R. 31). As part of appellee's case, Mr. Huckaba testified on re-cross-examination that he asked Mr. McMillan to place the order in appellee's name because Western Machinery Company would be able to accept an order from Northwestern Improvement Co. placed on open account, because credit for Bellingham Coal Mines Company would not be extended by the San Francisco office of appellant (R. 130).

Further, it is undisputed that appellee, though owning no proprietary interest in Bellingham Coal Mines Company, had previously entered into a management contract with the latter. Under the management contract, appellee was to manage the entire coal operations of Bellingham Coal Mines Company, and was to be reimbursed for all labor, materials, supplies and equipment furnished by appellee, *plus* twenty per cent of the cost or value thereof, as compensation for its services. Because of this financial arrangement with Bellingham Coal Mines Company, appellee could safely assent to Mr. Huckaba's request that the order be placed in appellee's name, knowing that upon approval of the board of directors of Bellingham Coal Mines Company, appellee could safely purchase the machinery for its own account and obtain reimbursement from Bellingham Coal Mines Company under the terms of the management contract. But apart from the machinery itself, appellee's agreement to pay therefor was supported by a valuable consideration. Consideration is defined by Williston as:

> "Mutual promises in each of which the promisor undertakes some act or forebearance that will be, or apparently may be, detrimental to the promisor or beneficial to the promisee, and neither of which is void are sufficient consideration for one another." Selections from *Williston on Contracts,* Sec. 103 (f) p. 142.

By addition of the new coal washing machinery, the productive capacity of the coal mine was increased. Surely there could be no other reason for acquiring the machinery. This being so, the management contract between Bellingham Coal Mines Company and appellee could be expected to increase in value as productivity, necessitating additional management service, supplies and equipment, increased. It is readily apparent that were it not for the management contract appellee would have no interest whatever in the development program of the mining company, and would not have committed itself to a liability in excess of $70,000. In addition to appellant's promise to furnish and install the machinery, Northwestern Improvement Co. received the benefit of a more valuable management contract.

Further consideration is found where appellee directed appellant as follows:

> "Please see to it that the routing of all equipment shipped on our orders to Bellingham gives maximum proportion of movement via Northern Pacific." (Plf. Ex. 2).

In discussing the elements of consideration, Williston points out that,

> "It would be a detriment to the promisee in a legal sense if he at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obligated to perform." Ibid., Sec. 102 A, p. 130.

Williston cites the following examples: "Thus, abstaining from smoking and drinking, though in fact in the particular case of benefit to the promisee's health, finances and morals, and of no benefit to the promisor, is a legal detriment and if requested as such is sufficient consideration for a promise." Ibid., Sec. 102 A, p. 130.

Mr. Williston next considers to whom the consideration must move, and states:

> "It is well settled that whether a benefit of the promisor is or is not a sufficient consideration, a detriment to the promisee is. This is equivalent to saying that if the promisee parts with something at the promisor's request, it is immaterial whether the promisor receives anything, and necessarily involves the conclusion that the consideration given by the promisee for a promise need not move to the promisor, but a move to anyone requested by the offeror." Ibid., Sec. 113, p. 156; *Restatement of Contracts,* Sec. 75 (2).

It is undisputed that appellee is a wholly-owned subsidiary of Northern Pacific Railway Company. It would seem a benefit to appellee to have shipments routed via Northern Pacific when possible. In fact, almost $1,000.00 in freight charges was paid to Northern Pacific for shipments of components of the coal

washing plant (Plf. Ex. 3). But irrespective of benefit to appellee, the promise to ship via Northern Pacific was a detriment to appellant because appellant was under no legal obligation to do so. Even if the benefit of that promise is deemed to have been received by a third party, Northern Pacific, the request therefor by appellee and the promise by appellant constituted a valid legal consideration which should bind appellee as principal, regardless of whether it be considered purchaser of the machinery.

At this point, appellant directs the court's attention to Finding of Fact IV (R. 11) and Conclusion of Law IV (R. 14) and to appellee's First Affirmative Defense (R. 6, 8). Appellee alleged in its affirmative defense and the district court found that appellee's assumption of liability for the purchase price of the machinery was without consideration to appellee. If this affirmative defense and finding mean that there was no consideration whatever for the assumption of liability, then the finding is clearly erroneous and the affirmative defense not proved, as the machinery was sold on appellee's credit and it would not have then been sold had not appellee promised to pay therefor. Appellee's agreement to pay the purchase price was the inducement for the sale of the machinery which was worth over $70,000.00. Certainly the sale of machinery, whether to appellee or Bellingham Coal Mines Company, was a sufficient consideration for appellee's promise.

If, on the other hand, the finding and affirmative defense mean that there was a consideration for the

assumption of liability but that it ran to a third party rather than to appellee, then the finding is unintelligible and meaningless and the affirmative defense no defense at all. Appellee was nevertheless bound to pay the purchase price whether the consideration ran to it or to Bellingham Coal Mines Company, as shown by the quotation from Williston above. The finding even so construed is erroneous, because appellee did receive a consideration for its promise to pay the purchase price. This consideration consisted of appellant's promise to ship via Northern Pacific and in the enhancement in value of the management contract.

Whichever view of Finding of Fact IV may be adopted, this finding is clearly and patently erroneous. The trial court failed to distinguish between compensation and legal consideration. The importance of this distinction is emphasized in a Comment in Vol. 31, Washington Law Review, p. 76.

Although the machinery was to be installed at the coal mine site, appellee was nonetheless the principal obligor, if not in fact the owner of the machinery. At the time the contract was signed, the parties dealt with each other as the only parties to the contract. Whether prior to this time it was contemplated that Bellingham Coal Mines Company would sign the contract and incur the obligation to pay the purchase price is immaterial, and evidence relating to negotiations prior to the signing of the contract is not even relevant. The fact is that at the time the contract was entered into Bellingham's credit was not acceptable to appellant (R. 130). For the purpose of consummating the order,

appellee agreed to and did sign the contract in its own name and on its own behalf. When the order was sent to appellant's home office in San Francisco for approval, appellee's was the only name appearing thereon and approval of the order was undoubtedly on that basis. Appellee's letter to Mr. Huckaba (Plf. Ex. 2) clearly shows that the credit of Bellingham Coal Mines Company was not relied upon at all. Bellingham was not asked to sign the contract and it did not do so. On February 20, 1952, the date the contract was signed by appellee, Bellingham Coal Mines Company was not obligated to appellant. Had Bellingham Coal Mines Company that day stated, "We refuse to pay for the machinery," could it be said that appellant could then have sued Bellingham for breach of contract? The answer is obviously no.

No matter what label or classification is used to describe the status of appellee, one thing clearly stands out. It is that appellee held itself out as and was regarded by appellant as a principal obligor. This status it cannot escape, and being a principal obligor no extension of time to pay can discharge it. This result also follows should it be held that Bellingham Coal Mines Company was a principal obligor, too. From the district court's Finding of Fact III (R. 11) that appellee "lent its name for credit purposes only", the further finding that appellee "thereby became a surety for Bellingham Coal Mines Company" does not follow. That there may be two principal obligors on a single undertaking requires no citation of authority. It would have been more consistent with the record

had the district court found that by reason of the benefit derived by Bellingham Coal Mines Company and appellee, both incurred liability as principal obligors. Accordingly, the trial court's Finding of Fact III (R. 11) and Conclusion of Law III (R. 14) are erroneous.

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### C. APPELLEE WAS NOT DISCHARGED, EVEN IF A SURETY.

Appellee at the trial urged and the district court found that appellee signed the contract and became bound as a surety only; that Bellingham Coal Mines Company was the sole principal debtor, even though it did not sign the contract; that appellant extended the time of payment to Bellingham without appellee's consent; and that by so doing appellee was discharged from any liability to appellant for payment of the purchase price.

It has always been appellant's contention that appellee was a principal debtor and in no sense a surety. If in fact it was a surety, however, appellee had the burden of proving all the elements essential to constitute a discharge. This it has not done.

The general rule relating to discharge of a surety by an extension of time to the principal is:

> "If the creditor enters into a binding agreement with the principal debtor to extend the time of payment, the surety is discharged. This consequence does not follow unless the creditor's promise is definite enough to be enforced, and is supported by legal consideration. . . . Neither is the surety discharged . . . (3) when the surety

> consents to the extension, or (4) when the creditor was unaware of the existence of the suretyship relation when he extended the time of payment. As to compensated sureties, the modern tendency is to hold them liable, notwithstanding the extension of time, except to the extent that they can show actual injury caused by the extension agreement." *Simpson on Suretyship,* Sec. 73, p. 351.

Succinctly, appellee will not be discharged if (1) appellant was unaware that appellee was a surety, or (2) appellee was a compensated surety, or (3) there was no extension of time in fact, or (4) there was no binding agreement to extend the time, or (5) appellee consented to or is estopped to consent to the extension of time. These elements will now be discussed in order.

**1. Appellant Was Without Knowledge That Appellee Was a Surety.**

In order for an extension of time for payment to discharge a surety, it is necessary that the creditor be aware that the third party is in fact a surety. *The Restatement of the Law of Security* at page 301 states the rule as follows:

> "So long as the creditor is entitled to regard a person as a principal, the latter will not be allowed to claim as against the creditor the benefit of rules for the protection of sureties."

Appellant at all times dealt with and was entitled to regard appellee as the principal obligor for the payment of the purchase price of the coal-washing

plant. Negotiations for the sale were with Mr. McMillan, an agent of appellee. When it became apparent during these negotiations that the credit of Bellingham Coal Mines Company was doubtful and would require a complete investigation, it was agreed that appellee should place the order as purchaser and principal obligor (R. 130), and the contract was executed in a manner that can reflect no other understanding. The record contains no evidence that the parties at the time of the purchase used the word "surety" or were even thinking in suretyship terms. Mr. McMillan's statement at the trial that he did not intend to bind appellee in any manner (R. 248) certainly shows this to be so.

All bills, including the final bill, were in the name of and sent to appellee (Plf. Ex. 3, 4). Discussions regarding payment then took place between appellant and Mr. McMillan. Subsequently, apparently under some arrangement between appellee and Bellingham Coal Mines Company, the terms of which were unknown to appellant and concerning which the record is silent, a payment on the account was made by Bellingham Coal Mines Company. Thereafter appellant requested further payments from Bellingham and ultimately took its note.

Throughout, however, appellant regarded appellee as the principal debtor. Its liability was fixed by the contract. Bellingham Coal Mines Company did not sign the contract and was not regarded by appellant as obligated to appellant at all. Even though later payments were accepted from Bellingham, appellee

was, as to appellant, still the principal debtor, and appellant continued to consider it as such. There was no change of relation between Bellingham Coal Mines Company and appellee of which appellant had any knowledge and which could convert appellee's liability as principal into one as surety. This being so, appellant was at all times entitled to treat appellee as principal, which in fact it did.

The case of *Blumenthal v. Seroda,* 129 Me. 187, 151 Atl. 138, is remarkably similar to the case before the court. There a mortgagor, who conveyed the real estate to another who assumed the mortgage, claimed to be a surety thereby and entitled to be discharged by an extension of time to the grantee made without the mortgagor's consent. The court held that knowledge by the mortgagee that the mortgagor is a surety must be shown and that the trial court's failure to give the jury an instruction thereon was error. The court stated:

> "But, it being also essential that the creditor should assent to the arrangement between his debtor and the debtor's grantee in order to relieve his debtor from primary liability, it is of course necessary that the creditor should know of the arrangement. One cannot well assent to that of which one is ignorant. 'If the extension of time of payment is to release the mortgagor, the creditor must know that the one to whom he granted the extension was a principal and the other a surety.' 2 Washburn Real Property (4th Ed.) 218. Upon well-settled principles, notice must be brought home to the holder of the mortgage before he can be charged with having vio-

lated the right of the maker of the note as a surety by extending the time of payment.

When one of two obligors in a bond claims release against the holder of the bond on the ground that he is surety for his co-obligor, and the creditor has given time to the principal debtor without the consent of the surety . . . the surety, to entitle itself to exemption from liability, must show that the facts of the suretyship were communicated to the creditor. The privilege of the surety is a mere equity, and can only be binding on those who have notice of its existence. *Kaighn, et al. v. Fuller, et al.,* 14 N. J. Equity 419. . . .

The surety who sets up in his defense an extension without his consent must allege and prove that the holder of the obligation had notice of the suretyship. If the creditor does not know of it when he grants the extension, the surety is not thereby discharged. 1 Brandt, Suretyship and Guarantee (3rd Ed.) Sec. 412; . . .

* * * * * * *

There is no direct evidence that the plaintiff (mortgagee) knew that payee (grantee) had assumed payment of the mortgage debt."

In the case before the court, appellee's original obligation created by the contract was that of principal, for no other party was bound to pay for the machinery. If appellee's obligation changed to that of surety by virtue of Bellingham Coal Mines Company's assuming the debt for the purchase price, knowledge of this change should have been brought home to appellant. In fact, appellant did not know of any such arrangement between Bellingham Coal Mines Com-

pany and appellee at the time the promissory note was accepted. The record is completely barren of any evidence which would tend to show that Bellingham Coal Mines Company became substituted (with appellee's consent) as debtor to appellant for appellee, or that such arrangement was ever brought to the attention of appellant, or that appellant ever assented to such an arrangement. There was no consideration running to Bellingham Coal Mines Company for the execution and delivery to appellant of the promissory note (Def. Ex. A-6) because Bellingham was not liable to appellant for the purchase price of the coal-washing plant. As shown by the *Blumenthal* case, the mere acceptance of payments on a debt from one other than the principal debtor does not in any way tend to show that the third party has assumed the obligation or that the creditor knew thereof or assented thereto. Accordingly, an extension of time to the third party, Bellingham Coal Mines Company, in this case, cannot in any way affect the rights of the creditor, appellant, against the principal debtor, appellee.

**2. Appellee, If a Surety, Was a Compensated Surety.**

Aside from the consideration necessary to bind appellee as a simple surety, appellee received additional independent consideration from appellant sufficient to put appellee in the class of a compensated surety. This additional consideration consisted partly of the promise of appellant to make maximum shipment via Northern Pacific Railway. As pointed out above, this promise was a legal detriment to appellant in that it was a promise to do something it had no

obligation to do. The benefit to appellee, as pointed out above, consisted of the right to designate how shipments should be made. Additional consideration is also found in the opportunity to make appellee's management contract more valuable by increasing productivity with the use of the machinery purchased. These two additional considerations the ordinary surety does not get. Because of these extra benefits to appellee, it should be set apart from the ordinary surety and regarded as a compensated surety whose contract is not *strictissimi juris.*

The case of *Holmes v. Elder,* 170 Tenn. 257, 94 S.W. (2d) 390, involved the consideration of the rules applicable to sureties who are not mere volunteer or accommodation sureties. The Gibson County Bank gave its bond to a depositor, and certain officers and stockholders of the bank signed as sureties. The sureties contended their obligations were to be strictly construed in accordance with the *strictissimi juris* doctrine. The court disagreed, saying:

> "However, conceding that the contract here is one of suretyship, the rule is one for guidance in construction only, and is subject to the basic rule that the instrument is to be considered as a whole, in the light of the circumstances surrounding its making, with the primary purpose of ascertaining just what was within the contemplation of the parties.
>
> And just here, as bearing on the application in the instant case of the stricti juris rule invoked, it will be borne in mind that this rule of construction is not applied in all cases of suretyship. Quite

> generally it is confined to cases of volunteer, uncompensated accommodation sureties, and not extended to corporate or other paid sureties.
>
> Now, while the bond before us is not a corporate bond, or one for which it appears that a consideration was directly paid, when the underlying reasoning is considered an analogy is apparent. The signers are the president and the cashier and other officers and stockholders of the principal obligor; prima facie they drafted the instrument they signed, and they became parties to the obligation for the purpose, not alone of securing to this depositor the repayment of trust funds coming into his hands officially, but of securing to themselves, through the institution which they officered and in part owned, the financial benefits incident to the use in handling of such funds. Indeed, their relation to this contract of indemnity, while on the face thereof and technically that of sureties, partook, in substance and in fact, of that of principal. So that, we are not inclined to adopt the view that special and tender consideration commonly accorded personal, uncompensated sureties is due respondent here."

Appellee in no case can be called a volunteer, accommodation or uncompensated surety. Appellee, in addition to the consideration referred to above, had an interest in the Bellingham Coal Mines Company to protect, even though it may not have been proprietary in nature. Its interest was in the prosperity of Bellingham Coal Mines Company, without which appellee could not have expected to receive the agreed compensation under the management contract. In this

respect, appellee's interest was identical to that of the president and cashier and the other non-stockholders sureties in the *Holmes* case, supra. Appellee was not the surety who guarantees his friend's note. Nor was it the mere creditor who became surety for his debtor with the hope of a future payment by the debtor. Appellee was inextricably bound up in the operation and life of Bellingham Coal Mines Company, and can in no way be identified with the friend or creditor who is the true volunteer, accommodation surety. Appellee should be treated as and governed by the rules applicable to compensated sureties.

**3. There Was No Extension of Time.**

The general rule applicable to the facts of this case is stated in *Corpus Juris Secundum* under the heading, "Where Maturity of Principal Debt or Period of Surety's Obligation Indefinite", as follows:

> "If no definite time of payment for the principal obligation is fixed, an agreement fixing a definite time of payment is not an extension discharging the surety."

The Supreme Court of Appeals of Virginia, in holding that a surety who guaranteed payment of a bank deposit was not discharged, stated:

> "Where there is nothing to show when the principal debt matures, there can be no such extension of time as to discharge the guarantors." *Looney v. Belcher,* 169 Va. 160, 192 S.E. 891.

The contract (Plf. Ex. 1) which constituted the agreement between the parties does not provide when

delivery of the machinery should be completed, nor when payment therefor should be made. From time to time components of the coal-washing plant were shipped to the coal mine site and billed to appellee (Plf. Ex. 3). When the final shipment was made, a final bill was prepared and forwarded to appellee on or about July 31, 1952 (Plf. Ex. 4) and approved by appellee on or about August 15, 1952 (Plf. Ex. 4). Contemporaneously with the transmittal of the bill and before installation was complete, discussions between the parties and Bellingham Coal Mines Company were had relative to arrangements for payment. On or about August 1, 1952, following final shipment of all components of the coal washing plant, appellant asked Mr. McMillan for a conditional bill of sale as security to appellant (Plf. Ex. 5). Mr. McMillan testified that he took the matter up with Mr. Ramage, president of Bellingham (R. 146). On or about August 10, 1952, further negotiations to this end took place between appellant and Mr. McMillan (R. 148). It appears also that a chattel mortgage on the machinery had been requested (R. 124). As a substitute for the conditional bill of sale or chattel mortgage, on or about August 20, 1952, appellant was offered a promissory note for the balance of the purchase price (R. 214), and on or about August 23, 1952, the note was delivered (Finding VII, R. 12).

Meanwhile, installation was in its final stages and on August 22, 1952, it was complete. Defendant's Exhibit A-14 shows this to be the completion date, as subsequent thereto all time of appellant's installation

supervisors was to be paid by Bellingham and not billed to appellant as was previously done.

Finally, issuance of a promissory note was discussed at meetings of the board of directors of Bellingham, at some of which Mr. McMillan was in attendance (R. 212). Issuance of the note was ultimately authorized and the note executed and sent to Mr. McMillan for approval before delivery. On August 23, 1952, the day after installation of the machinery was completed, the note was delivered to appellant (Def. Ex. A-9).

It is clear from this sequence of events that prior to the delivery and acceptance of the promissory note no time for payment of the purchase price had been agreed upon. In fact, the time and method of payment were the subject of extended discussions, all of which took place before installation had been completed. It was only upon acceptance of the promissory note by appellant that a date for payment was finally fixed. Accordingly, there was no extension of time which could discharge appellee.

### 4. There Was No Binding Agreement Extending the Time for Payment.

The district court held that the execution and delivery of the Bellingham Coal Mines Company note was an extension of time for the payment of the purchase price of the coal washing plant (Finding VII, R. 12). The note, however, was payable by its terms *on or before* a certain date and gave Bellingham Coal Mines Company the right to pay the note at any

time after execution and delivery (Def. Ex. A-6). Therefore, the agreement to extend time of payment lacks mutuality and is not binding.

The rule is stated in *Stearns Law of Suretyship,* 5th Edition, page 136, as follows:

> "In order for the agreement for extension of the time to discharge the surety, it must be mutually binding on both parties. If the principal may pay the debt at any time before the extended due date, the requirement of mutuality is not met and the surety is not released."

*American Jurisprudence* and *Corpus Juris Secundum* state the rule as follows:

> "The extension agreement must mutually bind both parties. If the obligor has the right to pay the debt at any time before the extended date, this mutuality is destroyed and the agreement is not valid." 50 Am. Jur. p. 946, Sec. 60.
>
> "An agreement for the extension of time must be supported by a sufficient consideration in order to effect the discharge of the surety. Mutuality is essential." 72 C.J.S. 656, Sec. 182.

The Washington court followed this rule in *Van de Ven v. Overlook Mining Co.,* 146 Wash. 332, 262 Pac. 981. There the following language was used to effect an extension of time of the payment of a note: "June 28, 1917, I hereby grant the extension of time of payment of the within note *on or before* six months from June 28, 1917, at 8%" (Emphasis added). The court held that this agreement gave the maker the right to pay the note at any time during the six

month period, and that the holder of the note would have been bound to accept payment at any time. The court in considering the general rule relating to extension of time stated:

> "The consideration moving to the holder of the instrument is the promise of the maker to pay interest during the full period of the extension, and the promise of the holder to forbear suit for the period constitutes a good consideration for the agreement on the part of the maker to pay interest for the full period." (Citations omitted.)
>
> "If the extension is for an indefinite time, in which the payor of the obligation extended had the right to pay at any time during the period of extension, there is no consideration moving to the holder of the instrument, nor is there a detriment to the promisor; this because the payee of the instrument gives up nothing, and the payor gives nothing; the payor may pay at any time, and the obligation stands, insofar as the payor is concerned, as it stood before the extension."

The rule is again stated in *Tsesmelis v. Sinton State Bank,* (Tex. 1932) 53 S.W. (2d) 461:

> "To support a contention that the payment of a negotiable instrument has been extended, there must exist all the elements essential to the execution of a contract . . . and the agreement for the extension must be for a definite time and mutually bind the parties, payor and payee, the one to forebear suit during the time of extension, and the other his right to pay the debt before the end of that time."

The court in finding no valid contract of extension stated that because the debtor had the right to pay the debt at any time, it was fatal to a claim of extension.

In *Kirby v. American State Bank,* (Tex. 1929) 18 S.W. (2d) 599, the court found an extension agreement invalid because the debtor could pay the debt at any time before the extended date, and stated:

> "It is clear from this language that the maker of the note was not obligated to pay interest for any definite time. He was privileged to pay the note under the agreement without incurring any obligation whatever for any additional interest over and above that already owing by him, if he desired to do so."

And in *Crossman v. Wohlaben,* 90 Ill. 537, 63 A.L.R. 1534, the court in finding that there was no valid extension agreement stated:

> "It is essential, in all such cases, that both parties should be bound by the agreement, or that it should have mutuality. The record in this case fails to show specifically that the principal debtor at any time bound himself to keep the money and pay the interest upon it for any specified time, or that he ever paid interest in advance."

Other cases announcing the same rule are *Heenan v. Howard,* 81 Ill. App. 629, *Keefer v. Valentine,* 199 Iowa 1337, 203 N.W. 787, and *Citizens Bank v. Douglas,* 178 Mo. App. 664, 161 S.W. 601.

Bellingham Coal Mines Company's promise to pay interest on the unpaid balance of the purchase price

was only a promise to do that which it was under a legal obligation to do. The rule in Washington is that interest is payable on an open account at the legal rate when the amount is definite, liquidated, or ascertainable by computation. *Mall Tool Co. v. Far West Equipment Co.,* 45 Wash. (2d) 158, 273 Pac. (2d) 652. The amount of the unpaid balance of the purchase price for the machinery has never been disputed. In fact, the final bill for the machinery was approved by Mr. McMillan (Plf. Ex. 4). In addition, by executing the promissory note, Bellingham acknowledged the amount thereof to be unpaid, and from that time appellant would have been entitled to interest at the legal rate even had the note not provided for interest. As a matter of fact, the note provided for interest at the rate of five per cent per annum while the legal rate in Washington prescribed by Rem. Rev. Stat. Sec. 7299 is six per cent per annum.

The promise of Bellingham Coal Mines Company contained in the note to pay the balance of the purchase price "on or before ninety days after date" did not obligate Bellingham to keep the money for any definite period of time. Likewise, its promise to pay interest on the balance "until paid" did not obligate Bellingham to pay interest for any definite period. Also, the incidental promise to pay attorneys' fees "in case suit or action is instituted to collect the note" did not definitely obligate Bellingham to pay attorneys' fees. If in fact there was consideration to Bellingham for said note and payment of the note could have been enforced by appellant, Bellingham

could have avoided any liability to pay interest for the full ninety days and could have avoided incurring any liability for attorneys' fees. This could have been done by paying the balance of the purchase price. This balance could have been paid the same day the note was issued, and in that event no interest whatsoever or attorneys' fees would have been payable. It is apparent, then, that appellant's promise to extend the time of payment, if such in fact it was, was unsupported by any binding promise of Bellingham or by other consideration.

**5. Appellee Consented to the Extension of Time and Is Estopped to Deny Its Consent.**

Throughout the entire transactions between the parties and Bellingham Coal Mines Company, Mr. McMillan was manager of Northwestern Improvement Co.'s coal operations, and the only official of appellee located in the State of Washington. At the same time, Mr. McMillan was operating manager, vice president, and a director of Bellingham Coal Mines Company. The entire negotiations relating to the purchase of the coal washing plant were with Mr. McMillan. He acted on behalf of Northwestern Improvement Co. and, apparently, Bellingham Coal Mines Company, too, in consummating the purchase of the machinery (R. 30, 97). The Seattle offices of appellee and Bellingham Coal Mines were identical (R. 135). It was Mr. McMillan who certified to the completion and satisfactory operation of the coal-washing plant (Finding X, R. 13). And it was Mr. McMillan who was instrumental in obtaining the ex-

ension of time upon which appellee bases its claimed lischarge. Mr. McMillan testified that he asked appelant's forbearance in demanding payment of the balnce due on the purchase price of the machinery (R. 84). He also testified that he consented to the issuance f the note along with the other members of the board f directors of Bellingham Coal Mines Company (R. 85). Mr. McMillan was familiar with the contents f the note and discussed it with Mr. Herbert S. Little, secretary of Bellingham Coal Mines Company, rior to delivery of the note (R. 210, 211). Prior to he issuance of the note, Mr. McMillan had not informed Mr. Little that the original order for the nachinery was signed by appellee, and not by Bellingam Coal Mines Company, nor that appellee was liable n any manner on the purchase of the machinery R. 207). Further, Mr. McMillan testified that in a elephone conversation with Mr. Goering of Western Machinery Company that he, Mr. McMillan, proposed hat a payment of $15,000.00 to $20,000.00 be made nd expressed the hope that appellant would forbear for a while (R. 183). It was under these circumstances that appellant contends that appellee through Mr. McMillan, its manager of coal operations, consented to the execution and delivery of the note and o such extension of time as may have resulted therefrom.

A case directly in point is *Woodcock v. Oxford and Worcester Railway Co.*, 61 Engl. Rep. 551, 1 Drewry 521. There the railway company entered into an agreement with a contracting firm for the construc-

tion of a railway tunnel, and the contractor's attorneys signed as sureties on the contractor's performance bond. Disputes arose between the contractor and the railway company. Settlement was made, resulting in substantial change in the original contract, by virtue of which the sureties claimed to be discharged because effected without their consent. The court held that the sureties were estopped to deny that they consented to the changes in the agreement, as it appeared that

> ". . . Not only that the transactions on which they rely for their discharge was known to plaintiffs, but that they assisted, as the solicitors of the principal debtor, in the preparation of instruments for carrying into effect the arrangements of which they complain."

Another instance in which a person acting in two capacities was estopped to deny that he acted in both capacities is treated in *Thomasson v. Walker,* 168 Va. 247, 190 S.E. 309. There Blackford, owner of land subject to a deed of trust securing payment of bonds, was also the executor of an estate. Using estate funds, Blackford purchased the bonds from the holder and assigned them to the estate. He then sought and obtained from the holders of the deed of trust a release thereof, stating that the bonds had been paid. The property was then conveyed by Blackford. Blackford died and Thomasson, his successor as executor, brought suit against the holders of the trust deed for the wrongful release thereof. The court held that as to these defendants the estate was estopped to deny

ts participation in obtaining and its consent to the release of the deed of trust, and stated:

> "His (Blackford) agents set in motion the steps to secure the release, if in fact, they did not actually induce the execution thereof. He was responsible for the acts of these agents in the same degree as if he were acting himself. As one person, he was so intimately bound up in the whole transaction that it was impossible for him to have kept his left hand from knowing what his right hand was doing. He was a representative of the estate, chosen by the testatrix, and in a position to fully perform the duties and obligations connected therewith. Whether or not he represented the estate fairly and honestly, so far as others are concerned, the estate is bound by his act and the acts of his authorized agents."

In *Levy Brothers Co. v. Sole* and *Bulova Watch Co., Ltd. v. Sole,* 1955 Ontario Weekly Notes 989, the Court of Appeal found under facts similar to the case now before the court that the surety consented to the extension of time. There Fred Sole, the retiring partner, claimed to be a surety when the remaining partner, Ernest Sole, assumed the partnership debts owing to the plaintiffs. In reviewing the facts, the court stated:

> "The evidence shows that Fred supported his brother's efforts to obtain release and that he was present at the meeting of the parties in January, 1953, when the extension of time and reduction in the payments were granted. The correspondence in February, 1953, between Mr. Purvis, the secretary of the Levy Company, and Ernest sets out

> that Fred had discussed with the company the matter of an extension of time for payment of both the Levy Brothers and Bulova Watch Company debt. The evidence of Mr. Day, the president of the Bulova Company, is to the effect that Fred agreed to be responsible for the partnership debt until it was paid; also that when the several extensions of time for payment were under negotion Fred was a party to the discussions."

Likewise, Mr. McMillan discussed with representatives of appellant extensions of time of payment (Rec. 146-148). In fact, on one occasion Mr. McMillan made a trip to San Francisco for the express purpose of obtaining an extension (R. 149). He was informed of the proposed extension before the promissory note which constituted the extension of time was sent to appellant, and he approved its transmittal. Under these facts, appellee must be deemed to have consented to the extension, just as the surety was held to have done in the *Levy Brothers* and *Bulova Watch Company* cases.

*Wyke v. Rogers,* 42 Eng. Rep. 609 and *Gorman v. Dixon,* 26 Can. S.C. 87, hold that express consent can be established by conduct as well as from words. In *Austin v. Gibson,* 28 U.C.C.P. 554, the court, relying upon *Wyke v. Rogers,* supra, held that where one bound individually, as a principal, and as one of three executors of the surety's estate agreed to an extension of time, consent of the surety's estate to the extension was established by such conduct.

In *Westveer v. Landwehr,* 276 Mich. 326, 267 N.W. 849, principles of estoppel were applied under the following circumstances: Landwehr, one of eight directors of a country club, signed a bond guaranteeing payment of a loan to the country club by the bank. While Landwehr was still a director, the country club from time to time issued several renewals of the note evidencing the loan. When the bank finally sued Landwehr and the other guarantors, Landwehr claimed he was not liable because all of the directors did not sign the bond as was contemplated. Because Landwehr was a director of the country club during the entire period, took an active part in the affairs of the club, was present at club directors' meetings where renewals were discussed, and with other directors participated in securing renewals, the court held that Landwehr, as an individual, was estopped to deny his liability as an individual on the bond.

It is a well settled rule that mere knowledge by the surety of the extension agreement is not sufficient to prevent its release. Yet, it is also the rule that,

> "It is also possible for a situation to arise where it would be his (surety's) duty to speak unless he acquiesced." *Klise Lumber Co. v. Enkema,* 148 Minn. 5, 181 N.W. 201.

American Jurisprudence also states the rule as follows:

> "A surety, however, is bound by the rules of good faith and fair dealing, as well as other men. If, therefore, as agent for the principal debtor,

> he requests and obtains an extension of the time of payment without mentioning his liability as surety, he is estopped to assert that he is released by reason of his want of assent as such to the extension." 50 Am. Jur. 956, Sec. 72.

The Alabama Supreme Court in *Jemeson & Co., Inc. v. Ensey,* 228 Ala. 559, 154 So. 553, found that a person representing separate corporations has a duty to make it known on whose behalf he is acting. In that case, the plaintiff was negotiating with a man named Tanner, who was at the same time representing two different corporations, one a real estate company and the other a mortgage company. The court stated:

> "Plaintiff cannot be held to have dealt with one corporation at one moment and with another the next in one and the same transaction with the same officer, in the absence of notice of the change of parties. Knowledge on the part of the acting officer that the other party is dealing with him as representative of the one, renders it the contract of that one."

It is clear from these cases that the person who at the same time represents both the surety and the principal debtor in negotiations with the creditor has a duty to make clear to the creditor on whose behalf the person is dealing. In the case now before the court, Mr. McMillan, in arranging for the original purchase of the machinery, must necessarily have been acting on behalf of both Bellingham Coal Mines Company and appellee, if the court finds that appellee

was, in fact, a surety as to appellant. When the time arrived for fixing a date for payment, negotiations again were with Mr. McMillan. It was to Mr. McMillan that appellant first made its request for a conditional bill of sale. It was upon Mr. McMillan's approval that the note was finally delivered to appellant. The record is completely lacking in any testimony or proof that Mr. McMillan advised appellant on whose behalf he was dealing, whether it was on behalf of Bellingham Coal Mines Company, on behalf of appellee, or on behalf of both. In the absence of any notice to the contrary, it was reasonable and justifiable for appellant to assume that Mr. McMillan represented both Bellingham Coal Mines Company and appellee at the time the note was given, just as he did when the machinery was purchased, that all parties concerned were in accord, since Mr. McMillan had authority or apparent authority to act for both parties.

In *Moody v. Stubbs,* 94 Kan. 250, 146 Pac. 346, the court held that a surety who clothed the principal with apparent authority to arrange an extension of time has no just cause to complain although not in fact aware that the extension had been granted. To the same effect is *Foster v. First National Bank & Trust Co. of Tulsa,* 179 Okla. 496, 66 Pac. (2d) 79.

American Jurisprudence also approves this rule, stating:

> "It (consent) may be given by the surety in person or through an agent of the surety who is clothed with actual or apparent authority to give

such consent in behalf of the surety. A surety who has no knowledge of the extension of time cannot be said to acquiesce in or assent to it unless he has clothed the principal debtor or some other person with authority to arrange for an extension." 50 Am. Jur. 956, Sec. 72.

Also, it is not necessary that the surety expressly give his consent. In *Johnson v. Paltzer*, 100 Ill. App 171, the court stated:

> "And the consent of the surety to the change in the terms of his obligation need not be by express agreement; it may be established by evidence of his passive acquiescence or ratification."

*Wyke v. Rogers*, supra, and *Gorman v. Dixon* supra, are additional authorities to the same effect

In 72 *C.J.S.* 660, Sec. 191, it is stated:

> "And implied consent may be sufficient to preclude the surety from asserting the defense of extension of time, as where the surety's consent is inferred from the fact that he was instrumental in procuring the extension."

In *First Trust Co. v. Airedale Ranch & Cattle Co.* 136 Neb. 521, 286 N.W. 766, the court found the sureties to be estopped to claim a discharge on the ground that they did not consent to an extension of time In that case four stockholders who were also officers of a corporation guaranteed the payment of the corporation's mortgage debt. These men sought and obtained an extension from the creditor. The men as sureties did not expressly consent to the extension

out the court held that the sureties were estopped to deny that they consented to the extension agreement.

In *Amidon v. Travers Land Co.*, 181 Minn. 249, 232 N.W. 33, a mortgagor sold the land to Elkin, who assumed the mortgage. Elkin was unable to pay as provided for in the mortgage and the mortgagor solicited and obtained an extension for Elkin, who gave a new note for the unpaid balance. The mortgagor subsequently claimed that he was released from payment of the mortgage because after the sale of the property to Elkin he became principal and the mortgagor surety and he had not consented to the extension of time. The court held that although the mortgagor was a surety he was estopped to deny that he consented to the extension because he was instrumental in obtaining the extension for Elkin. The court further stated that consent need not be in writing but may be shown by circumstantial evidence.

Finally, appellee has admitted that it agreed to the execution of the note. In its Third Affirmative Defense contained in the Amended Answer (R. 8), appellee alleges that a novation resulted from the issuance of the promissory note by Bellingham Coal Mines Company and that said novation released appellee. In discussing the elements of novation, American Jurisprudence states:

> "It is a well settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a

> such consent in behalf of the surety. A surety who has no knowledge of the extension of time cannot be said to acquiesce in or assent to it unless he has clothed the principal debtor or some other person with authority to arrange for an extension." 50 Am. Jur. 956, Sec. 72.

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> "It is a well settled principle that an essential element of every novation is a new contract to which all the parties concerned must agree, and in the absence of such agreement or consent a

novation cannot be effected." 39 Am. Jur. 262, Sec. 17.

By alleging that a novation occurred by the issuance of a promissory note by Bellingham Coal Mines Company, appellee necessarily acknowledges and states that all parties have consented thereto. As to appellee's consent, this allegation constitutes an admission, and it is immaterial that appellee was unable to prove the consent of appellant and Bellingham Coal Mines Company at the trial. *Appellee's* admission establishes beyond question appellee's consent to the issuance of the promissory note, regardless of its ultimate legal effect. The discharge of appellee as surety is grounded upon the promissory note extending time of payment. Appellee cannot now assert that it did not consent to the issuance of the note, a position completely opposed to and inconsistent with that adopted in its verified pleadings.

Because of the dual capacity in which Mr. McMillan served and the close operating relationship between appellee and Bellingham Coal Mines Company, appellee must be deemed bound by the acts of its agent, Mr. McMillan. It was his duty to inform those with whom he dealt which one of two masters he was representing, if in fact he was not representing both. Appellee, having clothed Mr. McMillan with apparent authority to consent to the extension and having actively participated in procuring the extension, through Mr. McMillan, should be estopped to deny that the extension was with its consent.

**6. Appellee Failed to Sustain Its Burden of Proving Its Affirmative Defenses.**

The trial court found that appellee did not sustain the burden of proof as to Affirmative Defenses II and III. It is appellant's contention that neither has appellee sustained the burden of proving Affirmative Defenses I and IV. There is no substantial evidence to support the court's fourth finding (R. 11) and fourth conclusion (R. 14) that appellee received no consideration for the assumption of liability for the purchase price of the coal washing machinery. The only supporting evidence is the self-serving objectionable testimony of Mr. McMillan that appellee received no consideration (R. 176). On the other hand, Exhibit 2 shows that shipment of the coal washing machinery was to be via Northern Pacific Railway as far as possible. Further, it is clear that the machinery would not have been delivered by appellant without a full credit report on Bellingham Coal Mines Company had not appellee agreed to sign the contract and to pay for the machinery. In addition, by the acquisition of the machinery the management contract between appellee and Bellingham Coal Mines Company became more valuable. There was both a detriment to the promisor, appellant, and a benefit to the promisee, appellee. Appellee did not sustain the burden of proof and the trial court's Finding of Fact IV (R. 11) and Conclusion of Law IV (R. 14) are unsupported by any substantial evidence and are erroneous.

Further, with respect to this affirmative defense of no consideration, it was incumbent upon appellee to prove all the elements constituting that defense, namely the existence of the principal-surety relationship, an extension of time in fact, a binding agreement to extend the time of payment, and the non-consent to or non-acquiescence in the extension by appellee.

The rule is clearly stated in *American Jurisprudence:*

> "Where a surety claims to have been released by an extension of time granted to the principal by the creditor, the burden, it has been held, is on the surety to show that such extension was made without his consent. Moreover, the burden is on the surety to show a binding agreement based upon some new and valuable consideration which is sufficient to preclude the creditor from enforcing the instrument covered by the extension."

Similarly, in *Amidon v. Travers Land Co.,* supra, the Minnesota court stated:

> "However, upon appellant was the burden of proving that a valid extension was made without its knowledge and consent."

Also in *Graham v. Peppel,* 132 Miss. 612, 97 So. 180, it was stated:

> ". . . and the burden was upon the appellee (surety) to show a positive and binding agreement based upon some new and valuable consideration, which was sufficient to preclude the appellant from enforcing the note during the period covered by the extension."

As pointed out above, there was no extension of the time for payment, but merely the fixing of time for payment, none having previously been specified.

The agreement whereby appellee claims an extension of time to have been made was not an enforceable agreement, as noted above.

Finally, appellee has offered no evidence and the record contains none tending to show that the promissory note which constituted the extension of time was issued without the consent of appellee. No question was propounded to Mr. McMillan as to whether appellee consented to the issuance of the promissory note, and he made no statement that appellee did not consent. In short, the record is entirely lacking in evidence of any character tending to show that appellee did not consent to the issuance of the promissory note. Under this state of the record, the trial court's Finding of Fact VII (R. 12) and Conclusion of Law VI (R. 15) are erroneous because unsupported by any substantial evidence.

---

## VI. CONCLUSION.

The contract for the machinery (Plf. Ex. 1), is unambiguous and therefore not subject to change or variation or explanation by parol evidence. Appellee is liable as purchaser or principal obligor having signed the contract in its own name without qualification or reservation. No signature or reference to Bellingham Coal Mines Company appears thereon.

Accordingly, it was error for the trial court to admit parol evidence for the purpose of showing that appellee signed the order in some capacity other than that which clearly appears on the writing.

Even considering the testimony and evidence admitted by the trial court, it further appears that appellee was primarily liable for the purchase price of the machinery, and received a valuable consideration for becoming such. Had not appellee agreed to become so bound, the machinery would not have been sold.

If, in fact, appellee was a surety for Bellingham Coal Mines Company for payment of the purchase price of the machinery, it occupied the status of a compensated surety. Appellee's parent corporation received freight revenues to which it would not have been entitled otherwise. The machinery sold increased the productive capacity of the coal mine, and, thus, added to the value of the management contract and lent greater assurance to appellee that it would be paid according to the terms of the management agreement. Appellee did not occupy the position of a mere stranger or even that of just a creditor of Bellingham Coal Mines Company. Appellee managed the coal mine which was the only productive asset and the only business of Bellingham Coal Mines Company. Appellee had a very great interest to protect and benefited greatly by the acquisition of the coal-washing plant, a vital component of the coal mining and marketing process. Accordingly, the rule of *strictissimi*

*juris* should not apply in this case, but, instead, the liberal rule relating to compensated sureties controls.

Finally, if it be determined that appellee is entitled to avail itself of the defenses accorded a voluntary surety, appellant submits that appellee has failed to sustain the burden of proving that there was a valid agreement for the extension of time and, further, that such contract was made without the consent of appellee. There was no extension of time because no date had been set in the contract (Plf. Ex. 1) when the purchase price would be due or payable. The promissory note fixing the time for payment was executed with the express consent of Mr. McMillan, the man with whom negotiations between appellant and appellee were had and the man who executed the contract for appellee. To now allow appellee to assert through Mr. McMillan that Mr. McMillan was not acting in the same capacities in which he originally dealt with appellant is unconscionable. If Mr. McMillan intended at the time the promissory note was executed and delivered to act only for Bellingham Coal Mines Company and not for appellee also as he had in the past, it was his duty to so inform appellant. Having failed to do so, appellee is estopped to deny its consent to the extension of time and to claim discharge of its liability to appellant.

Accordingly, appellant submits to the court that the judgment of the District Court dismissing appellant's complaint should be reversed and judgment entered against appellee in favor of appellant in the amount

of $48,445.47, the unpaid balance of the purchase price of the coal-washing machinery, plus legal interest from August 23, 1952, the day following completion of installation of the coal-washing machinery, together with its taxable costs and disbursements incurred in this court and in the District Court.

Dated, January 14, 1957.

Respectfully submitted,

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By Arthur P. Shapro,
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By Carl G. Koch,
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*Attorneys for Appellant.*

No. 15238

# United States Court of Appeals
## For the Ninth Circuit

WESTERN MACHINERY COMPANY, a corporation,
*Appellant,*

vs.

NORTHWESTERN IMPROVEMENT CO., a corporation,
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

## BRIEF OF APPELLEE

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# United States Court of Appeals
## For the Ninth Circuit

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| WESTERN MACHINERY COMPANY, a corporation, *Appellant,*<br>vs.<br>NORTHWESTERN IMPROVEMENT CO., a corporation, *Appellee.* | No. 15238 |

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

## BRIEF OF APPELLEE

### STATEMENT OF THE CASE

Appellant's statement of the case is very incomplete and appellee believes, in some major respects, inaccurate. Therefore, appellee deems it necessary to a proper understanding of the issues to make a more complete statement.

The appellee was the manager of a coal mine located at Bellingham, Washington, which was owned by the Bellingham Coal Mines Company, hereinafter referred to as the Coal Company. Appellee was paid only for the actual time that its supervisory personnel spent in managing the mine and for material furnished from appellee's stock of material, plus twenty per cent. Appellee received nothing for equipment purchased directly by the Coal Company or for labor hired by the

Coal Company. With specific reference to the purchase of the equipment, which resulted in the instant suit, the appellee did not receive, nor was it entitled to receive, any commission or "monetary gain" by reason of the purchase of that equipment (R. 175, 193-196, 200).

Appellant asserted in its brief that appellee was entitled to be repaid for all expenses of the Coal Company's mining operation, plus 20 per cent. Such is not the case, and specifically in regard to the equipment in issue, appellee was not entitled to make any profit whatsoever from the purchase of that equipment from appellant (R. 200).

Mr. Huckaba, the sales representative for appellant, contacted Mr. McMillan, an employee of appellee, who was supervising the mining operation for the Coal Company, and proposed that appellant furnish the coal-washing plant which was installed in the Coal Company's mine. Mr. Huckaba's first contact was made in the early part of January, 1952. During preliminary negotiations, Mr. Huckaba and Mr. McMillan made several trips to the Coal Company's mine at Bellingham (R. 54; Ex. A-2). At that time Mr. Huckaba was advised of appellee's relationship with the Coal Company. Also, Mr. Huckaba was fully aware that the equipment was for the Coal Company and that any purchase of a coal-washing plant would have to be approved by the Board of Directors of the Coal Company (Ex. A-2, A-3). During the negotiations, Mr. Huckaba sent written reports to his employer advising the appellant that the Coal Company's Board of Directors would have to give the "go ahead" for any order and

even kept track of the Coal Company's meeting dates when the matter was to be considered (Ex. A-2, A-3).

The preliminary negotiations resulted in a quotation being made to the Coal Company on January 16, 1952 (Ex. A-11). That quotation did not ripen into an order, and Mr. Huckaba was advised that because of a postponed Directors' meeting of the Coal Company it was not possible to get the Board's approval (Ex. A-12). Mr. Huckaba, on January 23, 1952, also advised his home office by an interoffice communication that "Mr. McMillan * * * would not overstep his authority by placing this [order] without meeting with the Board of Bellingham Coal Company" (Ex. A-1). Later, after the Coal Company approved the purchase, Mr. Huckaba submitted a second quotation dated February 20, 1952 (Ex. 1). That quotation was originally submitted to the Coal Company. However, since a credit investigation of the Coal Company would delay delivery, Mr. Huckaba asked Mr. McMillan if appellee's name could be substituted for the Coal Company's on the quotation, Exhibit 1, for credit purposes (R. 130, 174). The reason for this substitution of name was testified to by both Mr. Huckaba and Mr. McMillan and was uncontroverted. At that time it was definitely understood between those two gentlemen, who were the only negotiating persons, that the "equipment was being purchased for the Bellingham Coal Mines Company and that the Bellingham Coal Mines Company would pay for it" (R. 174).

The quotation was followed by an acceptance letter dated February 25, 1952, from Mr. McMillan to Mr.

Huckaba, in which Mr. McMillan set out in writing that the "equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager, and as such, has been duly authorized by the former to purchase this equipment. * * * the latter [Coal] Company is adequately financed and fully responsible for any commitments they may make at this time" (Ex. 2).

The appellant itself supplied a portion of the equipment, and other parts were furnished by suppliers. The latter were advised by appellant to ship the equipment, with the Coal Company as consignee (Ex. A-16, A-17). After the coal-washing plant was installed, appellant took an acknowledgment from the Coal Company alone, certifying to the satisfactory mechanical performance of the equipment (Ex. A-14).

As various shipments of the equipment were sent to Bellingham from April 30th through July 3rd, 1952, when the final shipment was made, the appellant sent bills covering each partial shipment, and demands were promptly made of the Coal Company for payment (Ex. 3, 4, A-5, A-8; R. 146, 202, 238). When payment was not forthcoming, appellant made attempts to obtain from the Coal Company a conditional sales contract or chattel mortgage covering the equipment (R. 146, 202, 238; Ex. A-5). Appellant did not ask appellee to give a contract or mortgage.

The Coal Company made a $15,000 payment on August 15, 1952, but refused to give a contract or mortgage (Ex. A-5). Later, on August 23, 1952, as a result

of negotiations solely between Mr. Barshell, Secretary-Comptroller of the appellant, and Mr. Little, director and attorney of the Coal Company, the Coal Company gave a ninety-day promissory note (Ex. A-6) to the appellant (R. 204; Ex. A-9). The evidence is uncontroverted that during all of the demands for and discussions concerning the giving of a promissory note, the appellant did not at any time ask that the appellee become a party to the note, nor was the appellee's name even mentioned (R. 159, 204, 237).

Appellant has asserted in its brief that the note given by the Coal Company to appellant was arranged by Mr. McMillan. The record is very clear that, although Mr. McMillan knew of the note, such was arranged between the attorney for the Coal Company and the appellant. It was also asserted that Mr. McMillan went to California to get the extension of time for payment which resulted in the giving of a promissory note. Again, the record is very specific that Mr. McMillan went to California several months after the note was given and even after the thirty-day extension which was granted on the note (R. 159-161; Ex. A-18). Upon taking the note, the appellant closed out an open account in the name of the appellee and opened a notes receivable account in the name of the Coal Company. The note was then assigned to appellant's bank (Exs. A-7, A-8; R. 216, 217). When the note was not timely paid, the appellant, on November 17, 1952, granted to the Coal Company a thirty-day extension on the note (Ex. A-18).

After the Coal Company made several payments on the note, the Coal Company was liquidated through

bankruptcy proceedings (R. 177). Appellant did not make any contention that appellee was obligated to pay for the coal-washing plant until March of 1953 when Mr. Shapiro, attorney for appellant, advised Mr. McMillan that possibly the appellee might be liable for the debt (R. 162, 206).

Appellant has asserted throughout its brief that the appellee was a wholly-owned subsidiary of the Northern Pacific Railway Company. The transcript of record is completely void of any such contention except a statement of appellant's counsel in his closing argument, at which time he referred to the letterhead of an exhibit which had not been mentioned during the trial.

## ARGUMENT

Since appellant's argument does not follow its specifications of error, this brief will likewise not be directed toward any particular specification of error, but for the sake of clarity, will be outlined to answer appellant's several arguments in the order in which they appear in its brief.

### A. Parol Evidence Is Admissible to Show a Contemporaneous Parol Contract

Appellant contends that parol evidence should not have been admitted to show that appellee is, in fact, a surety. In support of its position, it cited *Karatofski v. Hampton,* 135 Wash. 139, 237 Pac. 17, where the court was confronted with a contract which, by an express recital, made certain parties principals who were contending to be sureties. Because of that express provision, the case squarely fell within the terms of the

parol evidence rule. The facts of this case, however, bring it within a well-established exception to the rule which permits proof of a parol contemporaneous agreement, which was the moving cause of the written contract. The Washington Supreme Court said in *McGregor v. First Farmers-Merchants Bank & Trust Company,* 180 Wash. 441, 40 P.(2d) 144, 147, that the exception is "as firmly established as the rule itself." In that case the court permitted the holder of a cashier's check to show by parol evidence that the check was intended to be a receipt for funds held in trust by the bank. After discussing the parol evidence rule and many leading authorities, the court stated:

> " * * * that, where a parol contemporaneous agreement is the inducing and moving cause of a written contract, or where a parol agreement forms part of the consideration for a written contract, and it appears that the written contract was executed on the faith of the parol contract or representations, then such evidence is admissible. 3 Jones on Evidence (2d Ed.), Sec. 1492."
>
> *   *   *   *   *   *   *   *   *
>
> "Although an agreement between parties is reduced to writing, the law does not merge into the writing prior or contemporaneous agreements which are distinct, valid, and not in conflict with the writing. 3 Jones on Evidence (2d Ed.), Sec. 1440, p. 2712." (40 P.(2d) 147)

The explicit and uncontroverted evidence in this case proves a parol contemporaneous agreement between appellant and appellee made at the time Mr. McMillan received Exhibit 1, the price quotation, that appellee was to be a surety only. This case is not diffi-

cult to fit within the exception since both the quotation (Ex. 1) having the name change and the confirming letter (Ex. 2) show the intent of the parties and are fully consistent with the contemporaneous parol agreement. Exhibit 2, which was an essential part of the agreement, was very explicit in advising appellant that the equipment was

> "being bought for the Bellingham Coal Mines Company, and that the appellee had been duly authorized by the former [Coal Company] to purchase this equipment."

It further stated that the Coal Company was

> "fully responsible for any commitments they may make at this time."

Mr. McMillan and Mr. Huckaba both testified that the appellee's agreeing to be a surety was the motivating and moving cause of the change in the name on Exhibit 1, and thus, the execution of the purchase agreement in its final form (R. 130, 174).

In the very recent case of *Buyken v. Ertner,* 33 Wn. (2d) 334, 205 P.(2d) 628, 129 A.L.R. 673, the Washington court reaffirmed the use of the exception to the parol evidence rule which it then referred to as the "collateral contract" doctrine.

> " * * * the doctrine of 'collateral contract,' * * *, which, briefly stated, is that parol evidence does not affect a purely collateral contract, distinct from, and independent of, the written agreement, and, consequently such separate and independent contract between the parties may be proved by parol.
>
> "This principle is comprehensively, yet succinctly, enunciated in 32 C.J.S., Evidence, Sec. 997, p. 970, in the following paragraph:

> " 'The rule excluding parol evidence to vary or contradict a writing does not extend so far as to preclude the admission of extrinsic evidence to show a valid prior or contemporaneous collateral parol agreement between the parties, which is separate and distinct from, and independent of, the written instrument, has not been merged in, or superseded by, such instrument, and does not contradict, conflict with, or vary the express or implied provisions thereof or deal with a definite and particular subject matter which the written instrument expressly or impliedly undertakes to cover.'
>
> "Our decisions are in accord with the principle last above expressed." (205 P.(2d) 634)

The Washington court very early applied this "collateral contract" exception to a suretyship case. The case of *Amalgamated Gold Mines Company v. Ridgely,* 100 Wash. 99, 170 Pac. 355, recognized that evidence proving that one party to a contract is a surety and that a second party, not a signator to such contract, is in fact the principal, is admissible as an exception to the parol evidence rule. As authority for the decision in the *Amalgamated Gold Mines* case, *supra,* the Washington court cited *Hoffman v. Habighorst,* 38 Ore. 261, 63 Pac. 610, 53 L.R.A. 908. The Ninth Circuit, in the case of *Howell v. War Finance Corporation,* 71 F. (2d) 237, 243, said the *Hoffman* case, *supra,* is the leading authority on the subject. The Ninth Circuit, in the *Howell* case, *supra,* at page 243, found that

> " * * * when the parties to a contract know that one of them is a surety, such a fact may be shown by parol."

Both the *Howell* case, *supra,* and the *Hoffman* case, *supra,* were instances where a borrower obtained a loan from a creditor, who at the time of the transaction was well aware that the funds were for the benefit of a third party who was not present and who did not sign the written loan agreement. Yet, in each instance, the court permitted parol evidence to be introduced over the objection of the creditor to show that borrower was, in fact, a surety rather than a principal. In the *Hoffman* case, *supra,* the borrowers were stockholders of a corporation for which the money was borrowed and the court held at page 612 that:

> "The admission of parol evidence to show the true relationship of the makers of a promissory note, and that the payee had notice thereof, does not alter or vary the terms of the original contract, or affect its integrity. It is merely proof of an independent or collateral fact, * * *. 'The fact that one debtor is a surety for the other is no part of the contract with the creditor,' says Mr. Chief Justice Gray, 'but is a collateral fact showing the relation between the debtors; and, if it does not appear on the face of the instrument, this fact, and notice of it to the creditor, may be proved by extrinsic evidence.' "

The *Hoffman* case, *supra,* at page 612, and the *Howell* case, *supra,* at page 243, both stated that such fact of suretyship could be shown "although the name of the principal does not appear in the instrument which constitutes the evidence of the debt."

The evidence which appellant contends was admitted in violation of the parol evidence rule was not admitted to vary the terms of the purchase agreement, but

was properly admitted by the trial court for the specific purpose of proving that appellee is a surety and the Coal Company is the principal for the debt involved in this case.

**B. Appellee Is a Surety Rather Than a Principal**

At the trial appellant strongly contended and the court found in Finding of Fact II (R. 10) that the agreement to purchase and sell the coal-washing plant was founded upon two written documents, *i.e.,* the price quotation, Exhibit 1, and the written acceptance, Exhibit 2 (R. 28, 46). In making its argument that appellee is a principal, appellant, without explicitly so stating, is endeavoring to retract from its former position and build a case on the theory that the quotation alone constituted the contract. Obviously, the reason that appellant now desires to disregard the acceptance is because of the references made to the Coal Company by Mr. McMillan in that letter. Later, however, after appellant passed the discussion about who is a principal and discussed consideration, it referred to Mr. McMillan's routing request in the acceptance as the consideration for the execution of the contract. The two positions are inconsistent because, contending that the routing request is part of the consideration is also admitting that the acceptance, wherein the routing request is made, is part of the contract. The routing request was certainly not referred to in the quotation which amounted to only an offer.

The acceptance, of course, cannot be disregarded since it is a necessary part of the contract. The important wording of the acceptance has been quoted hereto-

fore, but it is important to again point out that it leaves no room for speculation as to why the equipment was being purchased. On the witness stand, Mr. Huckaba very explicitly admitted that he knew the equipment was for the Coal Company (R. 97, 102) and his report to his home office showed the approval for the purchase had to come from the Board of Directors of the Coal Company (Exs. A-1, A-2, A-3). The quotation (Ex. 1), itself, shows it was originally made to the Coal Company. It was only at the last minute that the quotation was changed to show the appellee and then merely for credit purposes (R. 130, 174). At that time, however, it was agreed that the Coal Company would pay for the equipment (R. 174).

On the question of whether the routing request was part of the consideration for the contract, entirely different legal questions are presented. First, is that request a part of the purchase contract itself, or merely a gratuitous remark that was outside of the contract and, therefore, nothing upon which consideration could be based? The quotation does not mention the Northern Pacific and neither is the acceptance contingent upon the routing. The routing request did nothing more than ask for voluntary action on the part of appellant. Even appellant, on line 4, page 24, of its brief, acknowledges that appellant was under no legal obligation to honor the request. Consequently, it could not be part of the consideration for the agreement. Even the trial judge was surprised during oral argument when the name of the Northern Pacific was linked with the subject of consideration (R. 18).

Assuming, however, for the sake of argument, that the appellee, is a wholly-owned subsidiary of the Northern Pacific, appellant has failed to show from the record how appellee, itself, derived any benefit from Mr. McMillan's mere request. On the other hand, there was considerable positive testimony that the appellee derived no benefit from the purchase, and, particularly, appellee was not entitled, as appellant implies in its brief, to any twenty per cent commission on the purchase of appellant's equipment (R. 193-6, 200).

Appellant, also, argues that the finding and conclusion relative to lack of consideration must be wrong since the court found appellee obligated as a surety. Appellant is confusing legal consideration, which is discussed by appellant's authorities as a basis for obligating a party under a contract, and actual benefit or monetary gain which a party may receive for becoming a paid surety. Clearly, a surety may be obligated to the creditor for various legal reasons, but still the surety can be a gratuitous surety who derived no actual benefit. It was appellee's position that it fell in the latter category, and appellant, although well aware of appellee's contention by affirmative defenses, put nothing in the record to refute appellee's well-supported position at the trial that, if it was in fact a surety, it was a gratuitous surety. Appellant has cited nothing in the record to substantiate its argument that appellee received some actual consideration for its becoming a surety, and this is understandable since appellee received none.

Mr. Huckaba knew, and communicated to appellant's home office, that he was dealing with the Coal Company

through Mr. McMillan. He felt the actions of the Board of Directors of the Coal Company concerning the proposed purchase were important enough to convey to his superiors, and did so on more than one occasion, as is shown on Exhibits A-1, A-2 and A-3. Up until the final moment that the last quotation was made, appellant did not concern itself with the appellee's desires as to whether the equipment should be ordered. It was only concerned with getting the Coal Company's approval. Then a quotation, which was originally made to the Coal Company, was changed for only one object, and that was, as the trial judge found, for credit purposes. The change was made by laymen who were not familiar with the niceties of law. However, Mr. McMillan, in his acceptance (Ex. 2), left no doubt as to who was purchasing the equipment and who authorized the purchase. Consequently, the evidence leads only to the conclusion that the Coal Company was the principal and obligated by the contract, and that appellee was only a surety.

### C. Appellee Was Discharged Because Appellant Extended Time for Payment of the Principal's Obligation Without the Consent of Appellee

#### 1. *Appellant agreed that appellee would be a surety.*

Appellant made an extensive argument discussing the requirement that a creditor be advised that a party is a surety. However, it has always been appellee's position that if it is obligated appellee became a surety at the time of the sale by reason of its negotiations and agreement with appellant, and at that time appellant was completely aware of appellee's position. Mr. Huck-

aba, the appellant's agent, participated in making the parol contract that made appellee a surety. The evidence showing Mr. Huckaba's full assent to the surety relationship has been previously discussed. Mr. Huckaba knew that Mr. McMillan was the agent for the Coal Company, and the quotation was originally made out to that company. Appellant acknowledged the relationship by taking the acceptance of the equipment from the Coal Company (Ex. A-14). Furthermore, shortly after delivery of the equipment, appellant requested a contract of sale or mortgage from the Coal Company, and most important, a promissory note was requested of the Coal Company alone, with no request being made of the appellee. Therefore, when appellant claims ignorance of the full picture, it is arbitrarily refusing to acknowledge the unquestioned testimony and record of this case.

Appellant is using blinders when it states that the arrangement was never brought to its attention or assented to by it, or that the Coal Company was not responsible for the purchase of the machinery which the Coal Company's Board of Directors, with the knowledge of appellant, ordered its agent, McMillan, to make.

***2. Appellee was not a compensated surety.***

Appellant's argument that appellee was a compensated surety is based upon the same grounds as its argument that appellee was a principal debtor, and nothing would be gained in again pointing out the reference to the record which conclusively proves that appellee received no consideration whatsoever for obligating itself as surety if, in fact, it was obligated at all. Appel-

lant has cited the case of *Holmes v. Elder,* 170 Tenn. 257, 94 S.W.(2d) 390, to substantiate its position. That case, however, is not in point as the court, in that case, explicitly stated that the *only* issue was whether a guarantee of a bank deposit continued during successive terms of an elective official or must be renewed at the end of each term.

***3. There was an extension of time.***

Appellant has endeavored to argue that the payments for the machinery were not due until fixed by the terms of the promissory note. If this theory were carried through to its logical conclusion, which is, that the only document covering liability for payment is the promissory note, then the appellee is not bound in any capacity. Clearly, however, counsel for appellant are disregarding the abundant evidence in the case establishing the debt as an open account. The provision on the back of the quotation (Ex. 1) indicates payment is to be made at time of shipment. The billings which accompanied each partial shipment stated the amount due for each partial shipment, including the sales tax therefor. Exhibits 3 and 7, and also the invoices themselves, stated under "terms" that payment was to be made by the 10th of the month. Furthermore, appellant set up an open account showing balances due after each shipment. If the appellant had felt that the balance was not due, as invoiced, it would not have billed and set up the sales tax separately, but rather sent one invoice showing total purchase price and total sales tax. Also, the invoice would have carried some other provision under "terms." Unquestionable proof that appellant

considered the account to be due long before November 20, 1952, was its insistence on payment which resulted in the Coal Company paying $15,000 on August 15, 1952, prior to the request for the promissory note (R. 183, Ex. A-5).

Appellee does not disagree with appellant's citations to the effect that a surety is not discharged unless the concession to the principal extends the time of payment. Clearly, the citations refer to instances such as bank deposits and other situations where the obligation has no maturity date. Such cases have no relevancy to the issue in question.

***4. There was a binding agreement extending the time for payment.***

Appellant maintains that because the note was payable *on or before* a certain date, which permitted the Coal Company to discharge the debt at any time, there was, in fact, no valid agreement extending the time of payment. Appellant cited several authorities and cases which dealt with indefinite agreements, but did not discuss any cases directly in point. Also, more important, appellant did not cite the Washington case which has decided this very problem adversely to appellant's contention.

In *Yakima Hardware Co. v. Strickler,* 164 Wash. 155, 2 P.(2d) 90, the plaintiff, which was the payee on a promissory note from Kennewick Hardware Company, on which note defendant was a surety, joined with other creditors of Kennewick Hardware in agreeing to withhold collection of their past due accounts, and in return

took from Kennewick Hardware an agreement for payment which read as follows:

> "Payment of *at least* 5% on the total of all claims listed as of April 1, 1927 shall be made *on or before* the 30th of each month, beginning May 30, 1927 * * *." (2 P.(2d) 90) (Emphasis supplied)

When Kennewick Hardware defaulted on its new agreement to the creditors, the payee brought the action against the surety on the old promissory note. The lower court held that the new agreement constituted an extension of time, releasing the surety defendant. The payee appealed, and one of its principal contentions was that the trial court erred in finding that the new agreement provided a valid extension of time for a consideration so as to relieve the surety from her liability. The Washington Supreme Court sustained the lower court's position and ruled that, even though the creditor, Kennewick Hardware Company, could have paid the whole debt at any time, such

> "element of definiteness of time, with reference to the binding effect of a contract such as this, is determined, not by reference to the choice or option given to the debtor, but by reference to the suspension of the creditor's right of action or demand. Here the creditor's right was definite, that is, 5 per cent per month, similar to a note payable on or before a given date, which may be paid at once but gives no right of action prior to the given date and yet sufficiently definite as to the element of time to constitute a valid obligation." (2 P.(2d) 92)

Appellant, to sustain its position, cited *Van de Ven v. Overlook Mining & Development Company,* 146 Wash.

332, 262 Pac. 981. In that case the payee merely wrote on the back of the promissory note that he would permit payment to be made *on or before* 6 months from the date of his notation. The court found that the notation for extension of time, on the face of it, did not provide any consideration. It did not, however, say that an extension agreement couched in such language could not provide a binding extension agreement. As later stated by the *Yakima Hardware Company* case, *supra,* if there is legal consideration for an extension agreement, the mere fact that the principal can come in and pay up the obligation at any time and thus avoid any further interest does not mean that the agreement is without valid consideration or not binding upon the parties.

Stern's Law of Suretyship, 5th Edition, 136, and 50 Am. Jur. 946, which were cited by appellant on the same point, rely exclusively for their statements that an "on or before" payment agreement has a lack of mutuality, on 85 A.L.R. 330, which in turn relies upon some language in *Tsesmelis v. Sinton State Bank,* 53 S.W.(2d) 461, 85 A.L.R. 319. The latter case, however, involved facts very similar to the *Van de Ven* case, *supra,* in which there was a mere forbearance rather than a definite agreement to extend the time of payment. In that case, the pertinent language read as follows:

> "We do not care to extend the old note, but will hold the time of payment in abeyance as above stated."

There was no question but that the court was correct when it held that the negotiations did not result in a valid contract of extension.

Since the law in Washington is expressed by the

*Yakima Hardware Company* case, *supra,* to the effect that an extension agreement discharging a surety may provide for payment on or before a date certain, the only remaining question in the case before the court is whether the note given by the Coal Company was supported by consideration.

The statutory law in the State of Washington provides that

> "Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration;" R.C.W. 62.01.024.

and that

> "Value is any consideration sufficient to support a simple contract. An antecedent or preexisting debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." R.C.W. 62.01.025.

Corpus Juris Secundum, in its discussion of consideration necessary to support a promissory note, states that

> "Some valid or valuable consideration is all that the law requires to support the undertaking of a party to a bill or note. If such a consideration exists its adequacy or sufficiency as compared to the value of the thing promised is ordinarily immaterial, in the absence of fraud, mistake or undue influence. The undertaking may be supported by a consideration of a most trifling nature or a consideration having 'no value' in the monetary sense; and it is in no way requisite that the consideration for a bill or note be adequate in value to the face amount of the instrument." 10 C.J.S. 603, Sec. 148c.
>
> * * *
>
> "Although it has been said that an agreement

> for forbearance should be for a definite time, ordinarily, the shortness of the time for which the forbearance or the suspension of the right to sue exists does not prevent it from being a valuable consideration, and a forbearance or an agreement for forbearance for a reasonable length of time is sufficient.'' 10 C.J.S. 622, Sec. 151g (3).

In several instances the Washington court has discussed valid consideration and has held that several factors present in the instant case constitute valid consideration for the execution and acceptance of a promissory note. In the very recent case of *Seattle Association of Credit Men v. American Alliance Aluminum Smelting Corporation,* 42 Wn.(2d) 636, 257 P.(2d) 637, 140 A.L.R. 1042, the court stated the rule

> ''that forbearance to sue for a past due obligation is consideration for a new note and mortgage.'' (257 P.(2d) 640).

In that case, Morley Magnesium Foundries executed a $100,000 note to the plaintiff to cover a past indebtedness, and, as a defense to the suit to enforce collection, contended that a past consideration is inadequate to support a note. With the former statement, the court held for the plaintiff. To support its position in the *Seattle Association* case, *supra,* the court cited a much earlier case of *Shrive v. Crabtree, Inc.,* 149 Wash. 500, 271 Pac. 329. In that case the plaintiff likewise took a note for past due accounts which provided for periodic payments. The defendant contended that there was no consideration for the note. However, the Washington Supreme Court found that the mere extension of time constituted consideration and made the following statement:

> "From the facts stated, it appears that, when the note was taken, there was an extension of the time of payment of the debts then due. The first question is whether this was a sufficient consideration for the note. The rule is that the extension of time for payment of a debt is a sufficient consideration for a bill or note of the debtor. 8 C.J. 236; *Traders' Nat. Bank v. Parker,* 130 N.Y. 415, 29 N.E. 1094; *Thomas & Co. v. Hillis,* 70 Wash. 53, 126 Pac. 62. Applying the rule to the facts of the present case, it must be held that the note was supported by a valid consideration." (271 Pac. 329)

Also see *Katz v. Judd,* 108 Wash. 557, 559, 185 Pac. 613. Since, in this case, the plaintiff took a promissory note from the Coal Company covering a past due obligation, that of itself constituted consideration.

There was still, however, other consideration to be found for the execution of the note. The note (Ex. A-6) provides for the promisor to pay costs and disbursements and a reasonable attorney's fee in the event it is necessary to bring an action to enforce collection. There is no question but what the appellant by the taking of the promissory note, enlarged its rights against the Coal Company and put itself in a substantially better position than it had by the mere open account. The authorities agree that the giving or taking of some additional right, such as payment of attorney's fees, constitutes a consideration for the giving of an extension of time.

> " * * * the surety will be discharged where the extension of time is in consideration of the principal's giving additional security for the debt, or waiving an exemption, or an agreement to pay at-

torney's fees as to the unpaid part of the debt." Stern's Law of Suretyship, 5th Edition, 139.

"An undertaking to pay attorneys' fees on the unpaid part of a note would clearly seem to constitute a sufficient consideration for an agreement by the holder to extend the time of payment. *Lee v. Lewis* (1926; Tex. Civ. App.) 287 S.W. 115 (affirmed in 1927) ...... Tex. ......, 298 S.W. 408)." 85 A.L.R. 330.

The element of interest in the note also constitutes consideration for its execution. The appellant contended in its brief that the agreement to pay interest on the note did not constitute consideration. However, there seemed to be two important factors that were overlooked. In the first place, appellant's comptroller testified at the trial that it was not entitled to charge interest on the open account (R. 78). Thus, it is appellee's position that the Coal Company's agreement to pay interest at 5 per cent constituted consideration and greatly benefited appellant's position. On the other hand, even assuming that appellant was entitled to collect interest at 6 per cent on the open account, the fact that the Coal Company was only obligated to pay 5 per cent on the promissory note would constitute consideration since the Coal Company received something of value and the appellant gave up something of value for the execution of the note. The Iowa court, in the case of *Mohn v. Mohn,* 181 Iowa 119, 164 N.W. 341, 345, agreed that

"a sufficient consideration * * * is furnished by the fact that there was a reduction of interest, the old indebtedness drawing 6, while the renewal note drew 5 per cent."

*5. Appellee did not consent to the extension of time.*

On pages 42 and 43 of appellant's brief, sweeping statements are made to the effect that Mr. McMillan was instrumental in obtaining the extension of time upon which appellee bases its claim of discharge and that Mr. McMillan consented to the issuance of the note. Despite the fact that appellant cited the record as the basis for its statements, appellant has greatly misconstrued questions and answers that have a very clear meaning. As a matter of fact, there is nothing in the record from which can be inferred that Mr. McMillan played any part in obtaining the issuance of the promissory note or had any contact with representatives of the appellant pertaining to the issuance of a note.

A complete reading of the record will reveal the following facts. Before any money was paid by the Coal Company on the open account, an employee of appellant telephoned Mr. McMillan about payment, and at that time Mr. McMillan did discuss a part payment from the Coal Company of $15,000 to $25,000. However, a note with an extension of time for payment was not discussed. (At this point it should be pointed out that, as appellant has so strongly expressed in its brief, mere forbearance is decidedly different than an agreement for a fixed extension date.) During the same conversation, appellant's representative asked that the Coal Company give a conditional sales contract or mortgage on the machinery. By a letter of August 15, 1952 (Ex. A-5), Mr. Ramage, president of the Coal Company, wrote the appellant enclosing $15,000 and advised appellant that the Coal Company would not encumber the

machinery because of the prospect of a government loan. Appellant's next contact about the account was by Mr. Barshell in a telephone conversation with Mr. Little, the Coal Company's attorney. During that conversation a promissory note was discussed *for the first time* and Mr. Little agreed to furnish such a note. Mr. Little testified at the trial that, during his discussion with the appellant concerning the note and extension of time, the appellee was never even mentioned (R. 204, 237). Appellant did not discuss the note with Mr. McMillan and the only relationship Mr. McMillan had with the note was an inquiry from Mr. Little as to the balance due on the open account. Mr. McMillan did not consent to the giving of the promissory note, nor did anyone ask Mr. McMillan if the note should be given.

Appellant states that Mr. McMillan consented to the issuance of the note along with the other members of the Board of the Coal Company and cites page 185 of the record as a basis for that statement. The reading of the record, however, will easily disclose that when Mr. McMillan testified about concurring with the Board of the Coal Company, he was referring to an extension of time for payment on the note itself, which resulted in appellant granting a thirty-day extension on the note (Ex. A18). The exact record (R. 184, 185) reads as follows:

> "Q. Isn't it true also, Mr. McMillan, that after the note was issued and received by Western Machinery Company, that to your knowledge there were several requests for extensions of time for the payment of it after it became due on August the 18th, 1952—November the 18th, 1952?

A. Yes, sir.

Q. And isn't it fact, Mr. McMillan, that on several of those occasions you personally requested Mr. Little to ask for such forbearance on the note?

A. No, sir.

Q. Is it your testimony that you did not personally discuss with Mr. Little and suggest to him or ask that he contact Western Machinery Company or me for further [186] time on the payment of this note?

A. First, I don't understand what you mean by 'personally.' As a member—

Q. I mean vocally through your own mouth, sir."

(Testimony of Earl R. McMillan)

"A. As a member of the Board of Directors of Bellingham Coal Mines Company I concurred in the request of the other members of the Board that extension be granted."

In discussing the law on what action of the surety will prevent his release when the creditor extends the time of payment for the principal, the appellant has again failed to discuss the several Washington cases which are directly in point, but has cited many old English and Canadian cases, together with cases from other jurisdictions which deal with factual patterns that are easily distinguished from this case. Those cases fall within definite categories which should be analyzed. However, first it would be well to review the Washington law where definite rules for this problem have been laid down.

The Washington court has adopted the general rule:

"that a valid agreement between a creditor and the

> principal debtor, extending the time of payment of an indebtedness *without the consent of the surety,* discharges the latter." (Emphasis supplied). *Gillam v. Purdy,* 167 Wash. 659, 9 P.(2d) 1092, 1093. Also see *Lipsett v. Dettering,* 94 Wash. 629, 162 Pac. 1007.

Thus, the Washington court has used the positive phrase of "without the consent of the surety." Such wording calls for affirmative and positive action, and, accordingly, the Washington court, defining what action constitutes consent, has held that the consent must come from something more than passive acquiescence. Rather, it must take some positive action to show consent. It should be noted that the Washington rule differs from some jurisdictions which require the extension to be made "without the *knowledge* or consent" of the surety.

In *Thompson v. Metropolitan Building Company,* 95 Wash. 546, 164 Pac. 222, a creditor contended that the surety was not discharged because the surety was familiar with the new agreement and made no objection thereto. The following quote from that case spells out the Washington rule under a factual pattern which is identical to the instant case:

> "It is urged that plaintiff knew of the composition agreement and the acceptance by defendant of the mortgage company bonds and did not object thereto, but it is well settled that mere silence on the part of a surety, when he is informed of a modification of the contract between his principal and the creditor or that a new obligation has been substituted in lieu of the original one, does not imply assent on his part. In order to bind him to the new

undertaking it is not sufficient that he passively acquiesce; he must actively consent to be bound by the terms of the new agreement. *American Iron & Steel Mfg. Co. v. Beall,* 101 Md. 423, 61 Atl. 629; 4 Ann. Cas. 883; *Edwards v. Coleman,* 6 T.B. Mon. (Ky.) 567; Brandt, Suretyship & Guaranty (3d ed.), §379; 32 Cyc. 161." (164 Pac. 224).

Text writers are also in agreement with the Washington rule, as can be seen from the following quotes from Brandt on Suretyship and Guaranty and American Jurisprudence:

"If the surety knows of the extension at the time it is given, it is not necessary that he should object thereto in order to entitle him to his discharge. And even if he signs the agreement for extension as a witness, that fact will not prevent his discharge by such extension. * * * If he is bound at all, his 'concurrence must bind him by the terms of the new (contract). It is not enough to bind him that he is informed and is passive; he is not required to object or protest; he must actively concur and consent to be bound by the terms of the new agreement.' " 1 Brandt, Suretyship and Guaranty 730, Sec. 379.

"Mere knowledge on the part of the surety that an extension is about to be granted or has been granted the principal is not equivalent to consent, since the law does not impose on him the duty to speak. In other words, the consent of the surety cannot be inferred from his silence or neutrality, but must be evinced by some positive act." 50 Am. Jur. 956, Sec. 72.

Also see *Klise Lumber Company v. Enkema,* 148 Minn. 5, 181 N.W., 201; *Sneed's Executor v. White* (Ky.), 20 Am. Dec. 175, and *Stewart, Administrator, v. Parker,* 55 Geo. Rep., 657.

Mr. McMillan did absolutely nothing to promote the furnishing of the promissory note, nor did he take any part in its execution or delivery. The only connection he had with the note was a telephone call from Mr. Little of the Coal Company ascertaining the amount due. There is testimony which indicates that Mr. McMillan was at a Board of Directors meeting when the note was discussed, but the record does not show that he took any part in such discussions. In any event, it is questionable whether there was a meeting before the note was given since the note was furnished within a couple of days after it was requested by the appellant (Ex. A-9).

The many cases cited by appellant on the problem of consent fall generally into one of the following three categories:

1. The surety requested an extension of time or actively participated in the negotiations to obtain an extension. (Under this category also fall the cases where the surety designated the principal to act as his agent).
2. The original undertaking, to which the surety was a party, provided for a future extension so that at the time the surety was originally bound, he could anticipate that an extension would be made at a later time.
3. The creditor, at the time it took a new agreement extending time of payment, specifically reserved rights against the surety by an agreement that the new note would not terminate the old note, but rather the new note would merely serve as security for the old.

Of those cases cited by appellant, most of them fall within the first category. Those cases coming within that group upon which appellant placed great stress are *Woodcock v. Oxford and Worcester Railway Co.*,

61 Eng. Rep. 551, 1 Drewry 521; *Levy Brothers Co. v. Sole,* 1955 Ontario Weekly Notes 989; *Bulova Watch Co., Ltd. v. Sole,* 1955 Ontario Weekly Notes 989; *Westveer v. Landwehr,* 276 Mich. 326, 267 N.W.849; *Amidon v. Travers Land Co.*, 181 Minn. 249, 232 N.W. 33; and *First Trust Co. v. Airedale Ranch & Cattle Co.,* 136 Neb. 521, 282 N.W. 766. Also in this category is *Moody v. Stubbs,* 94 Kan. 250, 146 Pac. 346, where the surety made the principal his agent so that the principal's action of requesting an extension also became the surety's request. Such a case, however, should not be confused with the agency argument advanced by appellant in which appellant has contended that the appellee, as surety, was acting on behalf of the Coal Company. In this case there is no contention that the Coal Company, which is the principal, ever acted for the appellee in furnishing the promissory note which extended the time of payment. Typical of the cases under the second category are *First Trust Co. v. Airedale Ranch & Cattle Co., supra; Johnson v. Paltzer,* 100 Ill. App. 171; and *Moody v. Stubbs, supra.*

The case of *Wyke v. Rogers,* 42 Eng. Rep. 609, is representative of those cases where the creditor reserved his rights against the surety when taking the extension agreement—the third category.

Although appellant has made erroneous statements of fact which would tend to bring this case within the first category, as has been previously pointed out, any allegations that Mr. McMillan was instrumental in obtaining an extension of time are erroneous and are not borne out by the record. Appellant can cite nothing in the record which shows that appellee actively consented

to be bound by the extension agreement. Mr. McMillan and the appellee did nothing more than passively acquiesce in the furnishing of the promissory note. Consequently, under the rule of the Washington cases, appellee cannot be estopped from asserting the defense that it was released from liability by the extension agreement.

## CONCLUSION

The trial court properly admitted parol evidence to prove that appellant knew the Coal Company was the purchaser of a coal-washing plant, and to prove a contemporaneous oral contract between the appellant and appellee under which, if obligated for the purchase of the coal-washing plant, appellee is only a surety and the Coal Company is the principal. Appellee respectfully submits that, if it is a surety, it sustained the burden of proof that by reason of the appellant taking a promissory note from the Coal Company extending the time of payment for the Coal Company's obligation without the consent of appellee or without reserving any rights against appellee, appellee was released from any obligation as a surety to pay the Coal Company's open account.

The findings support the conclusions and the decree of the District Court, and the decree should therefore be affirmed.

Respectfully submitted,

Dean H. Eastman
Roger J. Crosby
*Attorneys for Appellee.*

No. 15,238

# United States Court of Appeals

## For the Ninth Circuit

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WESTERN MACHINERY COMPANY,
a corporation,
*Appellant,*
vs.
NORTHWESTERN IMPROVEMENT CO.,
a corporation,
*Appellee.*

See back cover for Petition for Rehearing

**Appeal from the United States District Court for the Western District of Washington, Northern Division.**

**Honorable John C. Bowen, Judge.**

## APPELLANT'S REPLY BRIEF.

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No. 15,238

# United States Court of Appeals
## For the Ninth Circuit

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| | |
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| WESTERN MACHINERY COMPANY, a corporation, *Appellant*, vs. NORTHWESTERN IMPROVEMENT CO., a corporation, *Appellee.* | } |

**Appeal from the United States District Court for the Western District of Washington, Northern Division.**

**Honorable John C. Bowen, Judge.**

## APPELLANT'S REPLY BRIEF.

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### I.

### STATEMENT OF THE CASE.

Unfortunately, several pages of this brief must be devoted to inaccurate and misleading statements made by appellee. Appellee has attempted to minimize the importance of Mr. McMillan's position with appellee by stating that he was a mere "employee" (Appellee's Br. 2). In fact, the trial court found that at all times Mr. McMillan was manager of coal operations of appellee and the only official of that company located in Washington (R. 13).

Appellee claimed that appellant asserted in its brief that appellee "was entitled to be repaid for all expenses of the coal company's mining operation, plus 20%." In fact, at page 3 of its brief appellant stated that the coal company "agreed to reimburse appellee for all costs and expenses incurred by appellee in connection therewith [personnel and equipment supplied by appellee], and in addition to pay to appellee a fixed fee of 20% thereof" (R. 178).

Appellee's statement of the negotiations leading to the signing of the order is entirely inaccurate. Appellee indicates that the reason the order was made in the name of appellee was that a delay would be incurred in investigating the credit of the coal company. The real reason, according to the testimony of Mr. Huckaba, was that credit *would not be extended* to the coal company by appellant, but that the order could be placed by appellee on open account (R. 130). It was not a matter of delay at all but rather that no sale at all could be made to the coal company on open account. This hardly could be viewed as an understanding that the coal company would pay for the machinery as contended by appellee. The pertinent portion of Exhibit 2, which appellee omitted to quote in its brief, states, "This arrangement, of course, makes unnecessary any investigation on your part as to the financial responsibility of the Bellingham Coal Mines Company, which, as you know, was a newly organized corporation." Thus, it is most apparent that appellant was looking solely to appellee for payment.

On page 4 of its brief, appellee stated that appellant sent bills covering each partial shipment of components of the coal washing plant. It failed to point out, however, that these bills were sent to and were in the name of appellee, not the coal company.

Neither were negotiations leading to the issuance of the promissory note solely between Mr. Barshell and Mr. Little, as appellee states. The matter was taken up and discussed with Mr. Ramage and the other directors of the coal company, including Mr. McMillan (R. 202, 210, 212, Exhibit A-9).

Appellee further refers to the note as a "ninety-day promissory note," when in fact the note was payable "on or before ninety days after date" (Exhibit A-6).

Appellant did not, as appellee asserted, intend to indicate that Mr. McMillan's trip to California was to get the extension of time resulting in the promissory note. The trip to California was not until after the promissory note was issued and was referred to by appellant for the sole purpose of showing that after the issuance of the note, as well as before, Mr. McMillan attempted to get indulgences and extensions from appellant.

Finally, appellee makes some point that the record does not adequately support the finding that appellee was a wholly owned subsidiary of the Northern Pacific Railway Co. (But see the letterhead on Exhibits 2, A-12, A-13). No contention was made at the trial that this portion of the exhibits was inaccurate or incorrect. At no time, not even in its brief, has appellee denied

that it is a wholly owned subsidiary of the Northern Pacific Railway Co.

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## II.

## ARGUMENT.

### A. PAROL EVIDENCE IS INADMISSIBLE.

In its brief, appellee devotes five pages to the parol evidence issue in this appeal, only nine lines of which deal with the only Washington case directly in point and determinative of this issue. That case, cited in appellant's opening brief, is *Karatofski v. Hampton,* 135 Wash. 139, 237 Pac. 17. Ignoring that case, appellee has cited instead three Washington cases not in point but which discuss in general so-called exceptions to the parol evidence rule. These cases are *Amalgamated Gold Mines Company v. Ridgely,* 100 Wash. 99, 170 Pac. 355, *McGregor v. First Farmers-Merchants Bank & Trust Company,* 180 Wash. 441, 40 P. (2d) 144, and *Buyken v. Ertner,* 33 Wn. (2d) 334, 205 P. (2d) 628. The exceptions referred to in these cases were rejected in the *Karatofski* case and are equally inapplicable here.

In the *Amalgamated* case, the question was *as between the principal and surety,* which was which. Their relationship *as to the creditor,* who was not a party to the action, was not an issue. Furthermore, appellee's statement of the holding of the case (appellee's brief 9) is erroneous and misleading. The parol evidence rule was not discussed; the court merely stated that

the relation of principal and surety may arise by a parol agreement and need not be in writing.

The *McGregor* case did not involve suretyship, but was a suit to determine priorities *between creditors* of an insolvent bank. The court, four Justices dissenting, upheld the introduction of parol evidence to show the conditions under which the bank delivered a cashier's check. The check was in fact delivered as a receipt for money, a finding not inconsistent with the written instrument and leaving unaltered the obligation of the debtor bank to repay the money. As stated in *Schnitzer v. Panhandle Lumber Co.,* 14 Wn. (2d) 438, 128 P. (2d) 501, the court "simply regarded a cashier's check as a receipt for money." Appellee here seeks to change its obligation as principal to that of surety, an alteration contrary to and inconsistent with the written instrument.

The *Buyken* case likewise did not involve suretyship. The extensive quotations from that case printed in appellee's brief (pages 8 and 9) correctly describe the "collateral contract" exception to the parol evidence rule. As stated therein, a "collateral contract" may be proved if it is "separate and distinct from, and independent of, the written instrument, has not been merged in, or superseded by, such instrument, and does not contradict, conflict with, or vary the express or implied provisions thereof or deal with a definite and particular subject matter which the written instrument expressly or impliedly undertakes to cover." In the *Buyken* case, a contract to make the necessary jigs, dyes, patterns, broaches and other tools was rightly

held to be collateral to and independent of the contract to actually manufacture the article itself. In the present case, however, the exception cannot apply. Appellee sought to show an agreement whereby it would be liable in some lesser capacity than that in which it signed the written instrument. Such an agreement is not "separate and distinct from, and independent of, the written instrument"; it does "contradict, conflict with" and "vary" the provisions of the written instrument; and it does "deal with a definite and particular subject matter which the written instrument * * * undertakes to cover."

Appellee also relies on *Howell v. War Finance Corporation,* 71 F. (2d) 237, and *Hoffman v. Habighorst,* 38 Ore. 261, 63 Pac. 610. This court in the *Howell* case permitted parol evidence to determine in what capacity a note secured by a mortgage was signed. Because the note and mortgage related to yet another contract and the maker of the note and mortgage did not have any interest in the property mortgaged, the capacity in which the instruments were signed was not clear and free from ambiguity. Parol evidence to explain was therefore proper. In addition, it was an equity proceeding in which strict application of the parol evidence rule was not required.

The Oregon court in the *Hoffman* case permitted parol evidence to show that the makers of a note were in fact only accommodation makers. In so doing, the Oregon court recognized that other states took the opposite view and would exclude parol evidence for that purpose. Washington is one of those states; in

*Karatofski v. Hampton,* supra, the Washington court specifically excluded such parol evidence. The parol evidence rule is a matter of substantive law and this court must apply the law of Washington. Accordingly, decisions of other states, even if in point, are not controlling and cannot be considered.

---

### B. APPELLEE IS A PRINCIPAL DEBTOR.

Appellee in its brief refuses to recognize that both it and the coal company can be principal debtors, involving no question of suretyship. Appellee continues to assert that if the coal company was a principal appellee must necessarily be a surety. That this is an erroneous proposition is apparent.

To show it is a surety, appellee points out that Mr. Huckaba knew that the equipment was for the coal company, that the coal company directors had to approve the purchase, and that the original quotation was in the name of the coal company. All of this may be true, but it cannot change the final arrangement consummated. The final Quotation (Ex. 1) was in the name of appellee only and signed by appellee without qualification. Appellee in its brief (p. 12) states that it was agreed that the coal company would pay for the equipment. However, Mr. Huckaba, a disinterested witness at the trial, testified to no such understanding. On the contrary, he testified that the machinery was sold to appellee (R. 31), that credit would not be extended to the coal company (R. 130), and that appellee was well financed and able to place an order on open account (R. 130). Appellant was relying solely on ap-

pellee to pay for the machinery, and this is so even though the coal company might also be liable.

It is significant to note that the record contains no evidence that either Mr. Huckaba or Mr. McMillan ever used the terms "surety" or "principal" during their negotiations. It was always only a question of whom appellant was going to look to for payment. The record is clear that appellee was that person. Under these circumstances, it could hardly be accurate to state that there was an agreement that appellee was a surety, as did appellee on page 8 of its brief.

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### C. APPELLEE WAS NOT DISCHARGED EVEN IF A SURETY.

#### 1. Appellee, If a Surety, Was a Compensated Surety.

Appellee denies this, maintaining that it "received no consideration whatsoever for obligating itself as surety . . . " (Appellee's Br. 15). It is claimed by appellee that the requirement contained in Ex. 2 that shipment of the machinery be over Northern Pacific, appellee's parent corporation, was merely a request imposing no obligation whatsoever. Appellee even went so far as to state that appellant acknowledged this to be so (Appellee's Br. 12). This assertion is untrue and inaccurate. It was only *before* the contract was entered into that appellant was under no obligation to so ship. The requirement constituted a detriment to appellant which is legal consideration sufficient to constitute appellee a compensated surety.

Further consideration for appellee's promise is found in the enhancement in value of its management

contract with the coal company, as explained in appellant's opening brief. Appellee has not attempted to meet this argument, but merely states that it received no money for becoming obligated for the purchase price of the machinery. It is clear that the acquisition of the machinery increased the productivity of the mine and accordingly made the management contract more valuable, a direct benefit to appellee. It is clear that had there been no management contract, appellee would never have obligated itself to pay the purchase price of the machinery.

Appellee received legal consideration having economic value for its promise to pay the purchase price. It must be considered, therefore, a compensated surety, if not a principal debtor, to which the defense of extension of time is not applicable.

**2. There Was No Extension of Time.**

It is appellant's position that no time for payment was fixed until the execution and delivery of the promissory note. Appellee maintains that the order (Ex. 1) indicates that payments were to be made at the times of shipment, that the billings for partial shipments indicated that the times for payment were the 10th of the month following, and that such billings were reflected on an open account after each shipment. If each shipment were a separate piece of machinery and could be used independently of each other's shipment, appellee's argument would not be without force. However, in this case each shipment was of a part only of a machine which was to be assembled and put in opera-

tion by appellant at the coal mine site. Under these circumstances the purchaser of the machine could not be required to pay the purchase price until the whole machine was furnished, installed, ready for operation and accepted as such. It was not until after the final partial shipment was made and about one week before installation was completed that any attention was directed to the methods and time of payment. Various means of payment and security therefor were discussed. On the day after completion of installation a payment date was set and the promissory note issued. It was not until this occasion that a date for payment of the balance of the price for the completed product was set. Under these circumstances, it cannot be said that there was any extension in fact.

### 3. There Was No Binding Agreement Extending the Time for Payment.

Again appellee has almost completely ignored the leading Washington case directly in point on a vital issue, *Van de Ven v. Overlook Mining Co.,* 146 Wash. 332, 262 Pac. 981. In addition, it has incorrectly stated the facts of that case, as follows:

> "In that case the payee merely wrote on the back of the promissory note that he would *permit* payment to be made on or before six months from the date of his notation." (Page 19)

In fact, the endorsement read:

> "June 28, 1917, I hereby grant the extension of time of payment of the within note on or before six months from June 28, 1917, at 8%."

This was by no means a "mere forbearance" as appellee would have the court believe (Appellee's brief 19), but was an agreement to extend the time of payment. That agreement the court found to be unsupported by a consideration and lacking in mutuality because the debtor at any time could pay the note without any obligation for interest for the full period of the extension. In other words, by paying the note the debtor would be doing only that which he was bound to do before the extension was given and nothing more.

The coal company's note, too, provided for payment on or before a certain date and was therefore practically identical, except for the attorneys' fee provision. This provision did not cure the lack of consideration, as it also was infected by the fatal lack of mutuality. The debtor at any time could pay the note without any obligation for attorneys' fees. At no time before or after payment during the period could the creditor require the debtor to pay attorneys' fees. Likewise, it could not require the debtor to pay interest for the full ninety days if the principal were paid during the period. The text and legal encyclopedia writers also agree that mutuality is necessary to create a binding extension of time (see Appellant's opening brief, page 38).

Appellee has cited *Yakima Hardware Co. v. Strickler,* 164 Wash. 155, 2 P. (2d) 90, apparently contending that it overrules the *Van de Ven* case. This is a rather odd proposition in that the *Yakima* case is clearly distinguishable on its facts. Further, it appears that the court in that case did not consider its prior

decision in the *Van de Ven* case, which indicates that the court did not consider the two cases similar. Also, since decisions are not overruled by implication, the *Yakima* case, even if actually in conflict in principle as appellee contends, must be strictly limited to its peculiar facts.

The extension in the *Yakima* case was between the owner of an insolvent business and his many creditors. It provided for payment of "at least 5%" of the debt "on or before the 30th of each month" with interest. Had the agreement contained no more, the case would have been similar to the *Van de Ven* case. However, it contained the following additional provisions which constituted independent consideration for the extension:

1. The insolvent business was to be continued as a going concern for the creditors' benefit;

2. The debtor was required to purchase all merchandise from the participating creditors;

3. No other creditors were to be paid without the consent of the participating creditors;

4. The participating creditors were given direct control over the management of the business;

5. The creditors were given an interest in the assets of the business;

6. The participating creditors were to receive interest in excess of that to which they were otherwise entitled.

These were independent and direct benefits to the creditors which could have been enforced by the credi-

tors at any time regardless of whether the payments called for by the agreement were regularly made by the debtor. Accordingly, there most certainly was no lack of mutuality in that agreement. As proof of this fact, it should be noted that the court limited its discussion of the words "on or before" to whether they made the due date and therefore the agreement too *indefinite* to be enforced. No reference was made to mutuality. Clearly the *Yakima* case is not in conflict with the *Van de Ven* case and is not in point here.

Appellee has cited three cases to support its propositi- that an agreement to extend time need not be supported by a new consideration. None of the cited cases so hold. In *Seattle Association of Credit Men v. American Alliance Aluminum Smelting Corporation,* 42 Wn. (2d) 636, 257 P. (2d) 637, the creditor received a mortgage to secure payment of the note which constituted the extension of time; the mortgage was clearly consideration for the extension of time. In *Katz v. Judd,* 108 Wash. 557, 185 Pac. 613, and *Shrive v. Crabtree,* 149 Wash. 500, 271 Pac. 329, there was new consideration for the extension consisting of the debtor's obligation to pay interest for the full period of the extension even if the principal were sooner paid. These cases do not support appellees proposition and are not in point here. See *Strong v. Sunset Copper Co.,* 9 Wash. (2d) 214, 114 P. (2d) 526.

*Mohn v. Mohn,* 181 Iowa 119, 164 N. W. 341, cited by appellee is not the law in Washington. Apparently appellee failed to read carefully the *Van de Ven* case, which is a Washington case holding to the contrary.

The authorities cited by appellee and the facts of this case do not support the trial court's finding that there was a binding agreement extending the time for payment.

**4. Appellee Consented to the Extension of Time and Is Estopped to Deny Its Consent.**

Appellee, realizing how intimately Mr. McMillan was involved with the circumstances resulting in the delivery of the promissory note, has attempted in its brief to portray Mr. McMillan as a casual passerby ignorant of and oblivious to the economic crisis with which the coal company was enveloped. In fact, appellee even suggests to the court that Mr. McMillan, a vice president director and the operating manager of the coal company, did not discuss the note at all before it was given (Appellee's Br. 29). This suggestion is most reckless and contrary to the record. Mr. Little, a director and secretary of the coal company, testified that Mr. McMillan was present at meetings of the board of directors at which the issuance, execution and delivery of the note was discussed (R. 207). He was also at meetings prior to the issuance of the note at which Mr. Little was instructed to request indulgences and extensions from the various creditors of the coal company, including appellant (R. 208). In fact, these meetings were arranged so that Mr. McMillan could be present because, as Mr. Little stated, "he was an important employee of the company." (R. 208). In addition, it is clear that Mr. McMillan approved the

note prior to its transmittal to appellant (R. 210-212, Ex. 8, Ex. A-9).

Appellee in its brief (p. 25) maintains that the record does not support appellant's assertion that Mr. McMillan consented to the issuance of the note. The above citations thoroughly support that assertion. Also, the facts which so closely identify Mr. McMillan with the entire transaction, beginning with negotiations for the purchase of the machinery and ending with the final attempt to pay therefor, are succinctly and accurately set forth at pages 42-43 of appellant's brief.

Appellee has cited three Washington cases for the proposition that consent of the surety to the extension of time and not mere knowledge thereof is essential to preclude discharge of a surety. Appellee relies principally on *Thompson v. Metropolitan Building Company*, 95 Wash. 546, 164 Pac. 222. However, in the more recent *Yakima Hardware Company* case, supra, relied upon so strenuously by appellee in another part of its brief, the Washington court stated:

> "There can be no doubt, upon the evidence, that the contract of May 2, 1927, was entered into without the *knowledge* or assent of Mrs. Strickler."

It is by no means clear from the Washington decisions cited by appellee that in Washington *knowledge* by the surety of the intended extension of time is not sufficient to preclude the surety's discharge, especially where the same individual represents both the principal and surety. In the *Thompson* case the principal

and surety were not represented by the same individual nor did the surety in any way participate in effecting the extension, thus the court's comment that mere knowledge was insufficient to preclude the surety's discharge. That case, however, cannot be considered authority as the court's comment was merely dicta, the case being decided on another ground.

To distinguish the cases cited by appellant, appellee has summarily established three supposedly exclusive fact situations in which an extension of time would not discharge the surety. Appellee then equally summarily fits some of the cases cited by appellant into one of these categories and, of course, excludes the case now before the court. Strangely, however, three cases cited by appellant which are directly in point appellee has answered by completely ignoring. These are *Thomasson v. Walker,* 168 Va. 247, 190 S. E. 309, *Austin v. Gibson* (1878) 28 U.C.C.P. 554, and *Foster v. First National Bank & Trust Co. of Tulsa,* 179 Okla. 496, 66 Pac. (2d) 79. Appellee's failure to make any real attempt to distinguish the authorities cited by appellant can be for only one reason, i.e., it cannot honestly do so.

Appellee has meticulously avoided any reference to the fact that Mr. McMillan was at all times the primary representative of both the coal company and appellee; he was figuratively but one individual wearing two hats. It was his duty to inform the people with whom he dealt which hat he was wearing or, in other words, to advise on whose behalf he was acting.

It does not appear from the record that Mr. McMillan ever informed appellant that he was not acting for appellee as well as for the coal company at any time during the discussions relating to forbearances and extensions of time. In fact, Mr. McMillan even failed to inform the other officers of the coal company, until long after the note was due and the coal company was insolvent, that he had placed the order for the machinery in the name of the appellee only (R. 206-7). Because of his dual role and his failure to inform appellant on whose behalf he was acting, appellant was entitled to assume that he was acting in the capacities for which he had authority to act. He was both the representative of the coal company and the sole representative of appellee with whom the parties transacted business. Appellee must therefore be estopped to deny its assent, through Mr. McMillan, to the alleged extension.

---

## III.

### CONCLUSION.

Parol evidence was inadmissible to show that appellee signed the order for the machinery otherwise than as a principal debtor. Appellee has been unable to show that the rule of the *Karatofski* case is not applicable and controlling here. Accordingly, the trial court erred in admitting such evidence.

Appellee was a principal debtor even though the coal company may likewise have been a principal debtor.

When the order was signed appellant treated appellee as such and looked solely to the ability of the latter to pay.

Even if only a surety, appellee was nevertheless not discharged:

1. Appellant was not aware of the surety relationship.

2. Because appellee received legal consideration, it was bound and should be treated as a compensated surety.

3. There was no extension of time in fact; the note merely set a date for payment to be made, no other date having previously been fixed.

4. Because it provided for payment "on or before" a certain date, the alleged extension agreement lacked mutuality, there being no independent consideration to support it.

5. Because of Mr. McMillan's intimate connection with the affairs of both the coal company and appellee, and his repeated requests from appellant for indulgences and forebearances both prior and subsequent to issuance of the note, appellee, through Mr. McMillan, must be deemed to have consented to the alleged extension. In view of the dual capacity in which Mr. McMillan was acting, it was his duty to make known to all parties the capacities in which he was acting. Having failed to do so, appellee should be estopped to deny its assent to such extension.

Appellee has failed to sustain the burden of proving that it was a surety and that there was a valid and

binding agreement extending the time of payment without its consent. Having failed to sustain its burden, its affirmative defenses should have been denied and judgment awarded to appellant.

Dated, San Francisco, California,
June 17, 1957.

Respectfully submitted,
SHAPRO & ROTHSCHILD,
By ARTHUR P. SHAPRO,
KARR, TUTTLE & CAMPBELL,
By CARL G. KOCH,
COLEMAN P. HALL,
*Attorneys for Appellant.*

No. 15243

# United States Court of Appeals for the Ninth Circuit

ROBERT C. KIRKWOOD, Controller of the State of California,

Appellant,

vs.

LEE ARENAS, RICHARD BROWN ARENAS and UNITED STATES OF AMERICA,

Appellees.

# Transcript of Record

**Appeals from the United States District Court for the Southern District of California, Central Division.**

FILED

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PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-2-56

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Los Angeles 12, California.

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For Appellee United States of America:

LAUGHLIN E. WATERS,
U. S. Attorney,

RICHARD A. LAVINE,
Asst. U. S. Attorney, Lands Division,
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Los Angeles 12, California.

United States District Court, Southern District of California, Central Division

No. 1321-WM Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## ORDER TO SHOW CAUSE

To the United States of America and to the State of California: Upon reading and filing the verified petition of Lee Arenas and Richard Brown Arenas, and good cause appearing,

Now, Therefore, upon application of Irl Davis Brett, attorney for said petitioners,

It Is Ordered that the United States of America and the State of California, and each of them, be and appear before this Court in court room No. 2, second floor, 312 North Spring Street, Los Angeles, California, before the Honorable William C. Mathes, United States District Judge, on January 9, 1956, at the hour of 2 o'clock p.m. then and there to show cause, if they, or any of them, have, why the prayer of the petition of said petitioners Lee Arenas and Richard Brown Arenas should not be granted.

It Is Further Ordered that service of this Order to Show Cause together with two copies of the Petition upon which it is issued upon the United States Attorney at Los Angeles, [2*] presently counsel of record in this cause for the United States of America, on or before 5:00 p.m. December 7th, 1955, shall constitute sufficient and timely service.

It Is Further Ordered that service by mail of this Order to Show Cause together with a copy of the petition upon which it is issued upon the Governor of the State of California at his official office in Sacramento, California (or upon any agent which he has lawfully and expressly designated as the agent upon which service of process as against the State of California shall be made), deposited in the United States mail on or before 5:00 p.m. on 7th of December, 1955, shall constitute sufficient and timely service.

Dated: December 2, 1955.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed December 5, 1955. [3]

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

United States District Court, Southern District of California, Central Division

No. 6221-WM Civil

ELEUTERIA BROWN ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

## ORDER TO SHOW CAUSE

To the United States of America and to the State of California: Upon reading and filing the verified petition of Richard Brown Arenas, and good cause appearing,

Now, Therefore, upon application of Irl Davis Brett, attorney for said petitioner,

It Is Ordered that the United States of America and the State of California, and each of them, be and appear before this Court in court room No. 2, second floor, 312 North Spring Street, Los Angeles, California, before the Honorable William C. Mathes, United States District Judge, on January 9, 1956, at the hour of 2 o'clock p.m. then and there to show cause, if any they, or any of them, have, why the prayer of the petition of said petitioner Richard Brown Arenas should not be granted.

It Is Further Ordered that service of this Order to Show Cause together with two copies of the

Petition upon which it is issued upon the United States Attorney at Los Angeles, presently counsel of record in this cause for the United States of America, [4] on or before 5:00 p.m. December 7th, 1955, shall constitute sufficient and timely service.

It Is Further Ordered that service by mail of this Order to Show Cause together with a copy of the petition upon which it is issued upon the Governor of the State of California at his official office in Sacramento, California (or upon any agent which he has lawfully and expressly designated as the agent upon which service of process as against the State of California shall be made), deposited in the United States mail on or before 5:00 p.m. on 7th of December, 1955, shall constitute sufficient and timely service.

Dated: December 2, 1955.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed December 5, 1955. [5]

[Title of District Court and Cause.]

No. 1321-WM Civil

PETITION FOR ALLOCATION OF FUNDS ON DEPOSIT IN THE REGISTRY OF THE COURT AS BETWEEN LEE ARENAS AND RICHARD BROWN ARENAS; FOR DETERMINATION OF TAXES, IF ANY, WHICH ARE A LIEN UPON FUNDS IN THE REGISTRY OF THE COURT; FOR AN ORDER DIRECTING PAYMENT OF APPROVED CLAIMS AGAINST THE ESTATE OF ELEUTERIA BROWN ARENAS, DECEASED, AND FOR DISTRIBUTION OF FUNDS ON DEPOSIT IN THE REGISTRY OF THE COURT, AND OTHER RELIEF

Come Now petitioners Lee Arenas and Richard Brown Arenas and petition this Honorable Court and allege as follows:

I.

Petitioners are each enrolled members of the Palm Springs Band of Mission Indians.

II.

That on the 24th day of February, 1949, petitioner Lee Arenas received a trust patent to the following described lands which are situated within the Palm Springs Reservation in the City of Palm Springs, County of Riverside, State of California, to wit:

Parcel (a) Lot 46, Section 14, T4S, R4E, S.B.B.&M., comprising 2 acres; [6]

Parcel (b) Tract No. 39, Section 26, T4S, R4E, S.B.B.&M., comprising 5 acres;

Parcel (c) E½ SW¼ of the NW¼ and the SE¼ NW¼, NW¼ and the SW¼ of the NE¼ of the NW¼, all in Section 26, T4S, R4E, S.B.B.&M., comprising 40 acres.

III.

That prior to May 9, 1927, and at all times up to the date of her death on March 26, 1937, within the State of California, Guadalupe Rice Arenas was the lawful wife of petitioner Lee Arenas. That on the 24th day of February, 1949, the United States of America issued to the unnamed heirs and devisees of Guadalupe Rice Arenas a trust patent to the following described lands within the Palm Springs Reservation in the City of Palm Springs, County of Riverside, State of California, to wit:

Parcel (a) Lot 47, Section 14, T4S, R4E, S.B.B.&M., comprising two acres;

Parcel (b) Tract 40, Section 26, T4S, R4E, S.B.B.&M., comprising 5 acres;

Parcel (c) SE¼ of the NW¼ of Section 26, T4S, R4E, S.B.B.&M., comprising 40 acres.

IV.

That attorneys John W. Preston, Oliver O. Clark and David D. Sallee represented petitioner Lee Arenas in the commencement of the litigation in

this proceeding entitled Lee Arenas, Plaintiff, vs. United States of America, Defendant, and numbered 1321-WM Civil. That on April 6, 1951, a Judgment and Supplemental Decree was entered herein adjudging that said attorneys were jointly entitled to a judgment for legal services rendered by them in the obtaining of the allotments and the trust patents to Lee Arenas and to the heirs and devisees of Guadalupe Rice Arenas in the principal amount of $90,000.00 [7] together with costs in the amount of $258.57 and that a lien in the nature of a charging lien be impressed upon said lands and the whole thereof to secure the payment of said judgment. That such judgment became final.

V.

That pursuant to the original judgment in this cause directing and requiring the Secretary of the Interior of the United States to make allotments to Lee Arenas and the heirs and devisees of Guadalupe Rice Arenas, Deceased, and to issue the trust patents which are referred to and described in paragraphs II and III hereof, said allotments were made effective and said trust patents were issued as effective nunc pro tunc so as to vest and become effective as of May 9, 1927, which was the date finally adjudicated as between the United States of America and the allottees Lee Arenas and Guadalupe Rice Arenas as the date of their selections for allotment of said lands which are described and conveyed in said trust patents.

VI.

That Guadalupe Rice Arenas died intestate and the probate of her estate and the determination of her heirs was vested by law in and was determined by the Secretary of the Interior of the United States through his legally appointed Examiner of Inheritance, J. Lee Rawhauser. That said determination was made pursuant to the provisions of Section 1 of the Act of June 25, 1910, 36 Stat. 855, Title 25, U.S.C.A., Section 372; that said determination became final on July 25, 1949, and in said Order Determining Heirship, said Examiner of Inheritance determined and found that petitioner Lee Arenas and one Eleuteria Brown Arenas (now deceased) were the heirs at law entitled to succeed to the trust property of Guadalupe Rice Arenas; that each was entitled to an undivided one-half interest in the lands to which said Guadalupe was entitled; and that Eleuteria was the [8] adopted daughter of petitioner Lee Arenas and said Guadalupe.

VII.

That on or about November 8, 1949, and pursuant to said Order Determining Heirship, the United States of America issued a trust patent to Eleuteria Brown Arenas for an undivided one-half interest in Guadalupe's allotment which is described in paragraph III hereof and a trust patent to petitioner Lee Arenas for an undivided one-half interest therein. That said Determination of Heirship was contested and appealed by petitioner Lee Arenas but was affirmed on appeal by the Court of

Appeals for the Ninth Circuit on May 13, 1952, in a decision reported as Arenas v. United States in 197 Fed. 2d, 418, et. seq. and has become final.

VIII.

That subsequent to said Determination of Heirship, this Court made and entered an Order, Judgment and Decree; that the burden and obligation of the decree in case 1321-WM Civil run against the lands which are described in paragraphs II and III hereof so that the interest of petitioner Lee Arenas would be subject to three-fourths of said obligation and the interest of Eleuteria Brown Arenas therein would be subject to one-fourth of said obligation, and further provided, inter alia, that jurisdiction of this proceeding was retained to so adjust the lands and proceeds, or the lands or the proceeds, remaining after satisfaction of said judgment as to cause the Lee Arenas lands to bear three-fourths of the burden and the Eleuteria Brown Arenas lands to bear one-fourth of the burden of the judgment.

IX.

That upon application of said attorneys Preston, Clark and Sallee, a supplemental order, judgment and decree was entered herein directing the enforced sale by a Commissioner [9] appointed by this Court of the lands described in paragraphs II and III hereof (or so much thereof as should be required if less than all thereof would bring a price sufficient to satisfy such judgment) to enforce payment of and satisfy the lien and judgment in favor

of said attorneys together with accrued interest and costs.

X.

That with the consent and approval of the United States of America, the lands inherited from Guadalupe Rice Arenas were partitioned by deeds executed by the respective parties, one to the other, as follows:

> To petitioner Lee Arenas the N½ of Lot 47 in Section 14; the N½ of Lot 40 in Section 26; and the W½ of the SE¼ of the NW¼ of Section 26.

> To Eleuteria Brown Arenas the S½ of Lot 47 in Section 14; the S½ of Lot 40 in Section 26; and the E½ of the SE¼ of the NW¼ in Section 26.

XI.

That under compulsion of said Order, Judgment and Decree, and in order to avoid the hazard of a possible loss of all of said allotted lands through foreclosure sale, petitioner Lee Arenas consummated three private sales of certain portions of his trust patented lands which are described in paragraph II hereof, and also sold at private sale the following portion of his lands inherited from his deceased wife Guadalupe Rice Arenas, to wit:

> The W½ of the SE¼ of the NW¼ of Section 26, T4S, R4E, S.B.B.&M.

That there was deposited in the registry of this Court as the net proceeds of such sales the sum of $122,147.83.

XII.

That the United States of America and petitioner Lee Arenas appeal from the Order, Judgment and Decree of this [10] Court in this cause allowing interest upon such judgment to attorneys Preston, Clark and Sallee and said appeal is now pending and undetermined before the Court of Appeals for the Ninth Circuit.

XIII.

That Eleuteria Brown Arenas died intestate in Riverside County, California, on April 26, 1954, and pursuant to the provisions of the law which are referred to and described in paragraph VI hereof, the Secretary of the Interior of the United States, through his regularly appointed Examiner of Inheritance, J. Lee Rawhauser, found and determined that petitioner Richard Brown Arenas was the surviving son of and sole heir at law of Eleuteria Brown Arenas and entitled to inherit her allotted lands including her interest in the lands inherited by her from Guadalupe Rice Arenas, deceased, which are described in paragraph X hereof. That said Order Determining Heirs approved and ordered paid the following claims payable to the following named creditors in the following amounts:

Wiefels and Son, Funeral Directors, Box 359, Palm Springs, California..........$ 463.66
Mrs. Terry M. Lamb, 3826 East First Street, Long Beach 3, California....... 9,620.00 plus 6% interest from May 1, 1954

Bank of America, National Trust and Savings Association, Palm Springs, California (for promissory note dated February 10, 1954) .......................... 300.00
plus 6% interest from February 10, 1954

Bank of America, National Trust and Savings Association, Palm Springs, California, balance due on promissory note dated January 7, 1954, in amount of $321.60; present balance due unknown, since Sacramento Area Office has made payments thereon subsequent to decedent's death ......................

Hatchett's Market, Palm Springs, California .............................. 6.18

Desert Lock and Key, Palm Springs, California .......................... 15.51

California Electric Power Company, Palm Springs, California .................. 16.39

Palm Springs Water Company, Palm Springs, California .................. 4.60

Music and Appliance Company, Palm Springs, California .................. 28.62

That further reference will be made to the allowed claim of Mrs. Terry M. Lamb in paragraph XXII following. That said order became final on August 7, 1954.

XIV.

That by subsequent orders, judgments and decrees, this Court has caused to be paid and disbursed from said sum of $122,147.83 the total sum

of $101,922.03, which disbursements have fully satisfied, paid and discharged the judgment and lien of attorneys, Preston, Clark and Sallee except as to their claim for accrued interest, and this Court has ordered and required that the sum of $20,225.80 be retained in the registry to secure payment of such interest if, upon final judgment, the order and decree that such attorneys have interest be affirmed. That such disbursements have also fully paid, satisfied and discharged a fee for services rendered by counsel for petitioner Lee Arenas, Irl Davis Brett, Esq., for procuring and consummating such private sales including the legal steps taken in this cause to obtain authorization and approval thereof and all costs of suit in this cause excepting costs, if any, which will arise out of such pending appeal, which costs are also secured by the retained deposit heretofore described.

XV.

That by reason of the death of Eleuteria Brown Arenas and the inability of anyone to consummate private sales of her allotted lands, the distribution of funds described in paragraph XIV hereof was entirely made from funds derived from sales of [12] petitioner Lee Arenas' allotted lands and he thereby became entitled to repayment to the extent that such disbursement was in payment and satisfaction of the obligation of Eleuteria Brown Arenas.

XVI.

That in order to consummate the private sales heretofore described and set forth, petitioner Lee

Arenas obtained an order and judgment of this Court approving such sales by the terms of which it was provided, inter alia, that the lien of the judgment and supplemental decree in favor of attorneys Preston, Clark and Sallee and all other lawful and outstanding liens upon the lands so sold were transferred from said lands to the funds deposited in the registry of the Court. That in order to consummate said sales it was necessary that petitioner Lee Arenas obtain and supply to the purchasers policies of title insurance issued by private title insurance companies operating and doing business in the County of Rverside, California, and in order to obtain and supply such policies of title insurance it was necessary for petitioner Lee Arenas to and he did obtain releases of any claimed estate tax lien of the United States of America affecting the lands described in paragraphs III and X hereof which he had inherited from his deceased wife Guadalupe Rice Arenas together with a release of the State Inheritance Tax lien, if any, in favor of the State of California upon said lands, conditioned that said liens, if any there were, be transferred and affixed to the funds deposited in the registry of the Court.

XVII.

That subsequent to the vesting of title in him, petitioner Richard Brown Arenas, under compulsion of said charging lien upon the lands inherited by him through his mother Eleuteria Brown Arenas from his grandmother Guadalupe Rice Arenas which are described in paragraphs III and X

hereof, consummated [13] three private sales of certain portions of said trust patented lands which are described in paragraphs III and X hereof consisting of:

> The N½ of the NE¼ of the SE¼ of the NW¼ of Section 26, T4S, R4E, S.B.B.&M., the S½ of the NE¼ of the SE¼ of the NW¼ of Section 26, T4S, R4E, S.B.B.&M., and the SE¼ of the SE¼ of the NW¼ of Section 26, T4S, R4E, S.B.B.&M.

That there was deposited in the registry of this court in this cause as the net proceeds of such sales the sum of $29,419.70.

XVIII.

That in addition to such private sales, and through inadvertence and mistake in believing that the lands described in this paragraph were a portion of his inheritance derived from Guadalupe Rice Arenas, petitioner Richard Brown Arenas, under compulsion of another charging lien in favor of attorneys Preston, Clark and Sallee upon the lands inherited by him from his mother Eleuteria Brown Arenas but not inherited from his grandmother Guadalupe Rice Arenas, which charging lien was a part and portion of a judgment rendered by this Court in a case entitled Eleuteria Brown Arenas, Plaintiff, vs. United States of America, Defendant, and numbered 6221-WM Civil, petitioner Richard Brown Arenas consummated another private sale of certain trust patented lands within the Palm

Springs Indian Reservation which were originally trust patented to his mother, to wit, the N½ of the NW¼ of the SW¼ of the NE¼ of Section 26, T4S, R4E, S.B.B.&M., and there was deposited in the registry of this Court in that cause as the net proceeds of such sale the sum of $7,334.40. That for convenience, such sale will be referred to herein as the Plascjak sale.

XIX.

That at the date of the death of Guadalupe Rice Arenas, [14] March 26, 1937, the selections for allotment of Palm Springs Indian Reservation lands which had been made by various enrolled members of said bank in 1923 and in 1927, including the selection made by Guadalupe Rice Arenas, had been rejected by the Secretary of the Interior of the United States. That all judicial decisions and administrative actions through which the allotment was approved for and a trust patent was issued to the heirs and devisees of Guadalupe Rice Arenas occurred and took place after her death. That if the right to succession of trust patented Indian lands in the Palm Springs Indian Reservation is taxable by the United States of America and/or the State of California, such rights to tax are derived from judicial decisions made and entered after the death of Guadalupe Rice Arenas.

XX.

That petitioners are informed and believe and upon such ground allege that the United States of America claims that the rights of petitioner Lee

Arenas to succeed to his one-half interest in the trust patented lands which became his one-half share of the allotment to his deceased wife, Guadalupe Rice Arenas, is subject to an estate tax under allegedly applicable laws of the United States and that the right of the deceased adopted daughter, Eleuteria Brown Arenas (which right has now been succeeded to by petitioner Richard Brown Arenas), to succeed to the other one-half of the trust patented lands derived from the allotment to Guadalupe Rice Arenas is likewise subject to an estate tax under said laws and that the United States of America further contends that the right of Richard Brown Arenas to succeed to the rights of Eleuteria Brown Arenas in the lands which said Eleuteria had in turn inherited from Guadalupe Rice Arenas is likewise subject to an estate tax under said laws. That if said claims are established, they are a lien upon the funds now on deposit in the registry of the court pursuant to the judgments, orders and decrees heretofore made by this Court [15] in authorizing and approving the sales hereinbefore described. That petitioners each deny that any such estate tax is leviable or lawful and allege that since such succession rights are solely and exclusively derived through the General Allotment Act of 1887 (the Act approved February 8, 1887, chapter 119, paragraph 5; 24 Stat. 389; Title 25 U.S.C., Section 348) and the Mission Indian Act of 1891 (the Act approved January 12, 1891; 26 Stat. 712) both as amended, the rights of petitioners to such inherited

allotted lands are not derived through general succession but through special succession in fulfillment of the obligation of the United States that the restricted trust patented property shall be held free of all charge and encumbrance whatsoever, whether voluntary or involuntary, made or incurred by the trust patentee. That the conversion of a portion of such trust patented inherited lands through the sales thereof with the approval of this Court and the United States under compulsion of the decrees of this Court as heretofore described and set forth did not change the trust character of or limitations upon the funds into which they were converted, and which funds are now on deposit in the registry of the Court in this action, and that no succession tax or any other tax by the United States of America could be levied upon or affixed to or has been levied upon or affixed to such trust restricted funds.

XXI.

That petitioners are informed and believe and upon such ground allege that the State of California claims that the rights of petitioner Lee Arenas to succeed to his one-half interest in the trust patented lands which became his one-half share of the allotment to his deceased wife, Guadalupe Rice Arenas, is subject to an inheritance tax under allegedly applicable laws of the State of California and that the right of the deceased adopted daughter, Eleuteria Brown Arenas (which right has now been succeeded to by [16] petitioner Richard Brown Arenas), to succeed to the other one-half of the

trust patented lands derived from the allotment to Guadalupe Rice Arenas is likewise subject to an inheritance tax under said laws and that the State of California further contends that the right of Richard Brown Arenas to succeed to the rights of Eleuteria Brown Arenas in the lands which said Eleuteria had in turn inherited from Guadalupe Rice Arenas are likewise subject to an inheritance tax under said laws. That if said claims are established, they are a lien upon the funds now on deposit in the registry of the Court pursuant to the judgments, orders and decrees heretofore made by this Court in authorizing and approving the sales hereinbefore described. That petitioners each deny that any such inheritance tax is leviable or lawful and allege that since such succession rights are solely and exclusively derived through the General Allotment Act of 1887 (the Act approved February 8, 1887, chapter 119, paragraph 5; 24 Stat. 389; Title 25 U.S.C., Section 348) and the Mission Indian Act of 1891 (the Act approved January 12, 1891; 26 Stat. 712) both as amended, the rights of petitioners to such inherited allotted lands are not derived through general succession but through special succession in fulfillment of the obligation of the United States that the restricted trust patented property shall be held free of all charge and encumbrance whatsoever, whether voluntary or involuntary, made or incurred by the trust patentee. That the conversion of a portion of such trust patented inherited lands through the sales thereof with the approval of this Court and the United States under

compulsion of the decrees of this Court as heretofore described and set forth did not change the trust character of or limitations upon the funds into which they were converted, and which funds are now on deposit in the registry of the Court in this action, and that no succession tax or any other tax by the State of California could be levied upon or [17] affixed to or has been levied upon or affixed to such trust restricted funds. Petitioners further allege that the adoption of the laws governing heirship of the State of California as the requirement for inheritance of said allotted trust patented lands under the provisions of the Acts of Congress immediately heretofore referred to and described did not make such lands subject to a State inheritance tax nor make inheritance thereto subject to the laws of the State of California but that, to the contrary, such adoption was merely a convenient means for the Congress to express its will and was descriptive only of the will of Congress as expressed in such legislation.

XXII.

That since the allowance of the claim in favor of Mrs. Terry M. Lamb as set forth in paragraph XIII, page 6, lines 20 to 22, was approved and ordered paid in the administrative probate of the estate of Eleuteria Brown Arenas, payments have been made by the Indian Office of the United States out of funds accruing in favor of petitioner Richard Brown Arenas so that the unpaid balance of principal is now the sum of $8,657.96 plus interest at 6%

per annum from October 21, 1955, until paid. That in addition to the accrual of interest, said claim arises out of a purchase contract of an improved residential structure and may be subject to forfeiture as against petitioner Richard Brown Arenas if not paid in accordance with the existing contract between Mrs. Lamb and said decedent. That for such reason petitioner Richard Brown Arenas alleges that Mrs. Lamb should have priority payment thereon.

XXIII.

That during the course of this litigation and after the finality of the judgments affixing liens upon the properties heretofore described, Irl Davis Brett, Esq., has been and is the attorney for petitioners, and each of them. That he has been [18] fully paid for all services rendered excepting as follows: that at the request of petitioner Lee Arenas he has advanced and expended in behalf of said petitioner the sum of $92.38 for filing fees in the District Court and in the Court of Appeals for the Ninth Circuit and for the printing of a brief in behalf of petitioner Lee Arenas in the proceeding upon appeal, No. 14555 which involves the pending appeal of the United States of America and of Lee Arenas from that portion of the decree of this Court which awarded petitioners Preston, Clark and Sallee interest upon the principal and costs as set forth in the judgment and supplemental decree in this cause which was entered herein April 6, 1951, and in which such parties also have appealed from that portion of said judgment which awarded the sum

of $468.19 together with interest thereon at 7% per annum from January 1, 1952, until paid to John W. Preston. That upon request of both petitioners herein, said attorney prepared, served and filed a brief in behalf of Lee Arenas in said cause upon appeal and argued in behalf of the appellants at the oral hearing thereof.

That said attorney has prepared this petition and the Order to Show Cause to be issued thereon and has prepared a brief upon the law in respect to the issues presented thereby and has been employed to and will represent both petitioners until the conclusion of such proceedings. That the questions with respect to taxation are novel and intricate and the amount of work which said attorney will be required to perform may vary considerably dependent upon the responses to the Order to Show Cause which will be issued upon the petition and the issues raised thereby. That petitioners have no other funds with which to pay and reimburse said attorney and therefore request that a reasonable sum be retained in the registry of the Court pending the final determination of the issues herein raised and to be raised and the performance of the services in their behalf by [19] said attorney to secure payment of his said services.

Wherefore, petitioners respectfully pray:

1. That this Court fix and determine the amount of the funds now on deposit in the registry of the

Court in this action which should be allocated as the funds of Lee Arenas and further fix and determine the amount of such funds which should be allocated as the funds of Richard Brown Arenas and that in connection therewith the Court give consideration to and make allocation of the respective obligations of each of the petitioners for fees, expenses, disbursements and any other costs or obligations which were the lawful obligations of each.

2. That this Court determine that the United States of America has no tax obligation or lien against either of the petitioners and that the funds on deposit in the registry of the Court are not subject to any lien in its favor.

3. That this Court determine that the State of California has no tax obligation or lien against either of the petitioners and that the funds on deposit in the registry of the Court are not subject to any lien in its favor.

4. That this Court order and direct that there be paid out of the funds allocated to petitioner Richard Brown Arenas the approved claims against the estate of Eleuteria Brown Arenas, deceased.

5. That this Court fix and determine such reasonable sum as will secure the payment of advances made and to be made by petitioners' counsel, Irl Davis Brett, Esq., and for his services rendered and to be rendered herein for which payment has not already been made and that such sum as so fixed be

retained in the registry of the Court as security for such payment until the further order of the Court.

6. That the remaining funds be distributed to the petitioners. [20]

7. For such other further and general relief as in equity ought to be granted.

That an Order to Show Cause be issued herein requiring that the United States of America and the State of California, and each of them, be and appear before this Court on such date, time and at such place as the Court shall fix and determine and set forth in said Order to Show Cause, then and there each to show cause why this Court should not make the orders herein prayed for.

Dated:

/s/ IRL D. BRETT,
Attorney for Petitioners.

Duly verified.

[Endorsed]: Filed December 5, 1955. [21]

[Title of District Court and Cause.]

No. 6221-WM Civil

PETITION FOR DETERMINATION OF TAXES, IF ANY, WHICH ARE A LIEN UPON THE FUNDS IN THE REGISTRY OF THE COURT; FOR AN ORDER DIRECTING PAYMENT OF APPROVED CLAIMS AGAINST THE ESTATE OF ELEUTERIA BROWN ARENAS, DECEASED, AND FOR DISTRIBUTION OF FUNDS ON DEPOSIT IN THE REGISTRY OF THE COURT, AND OTHER RELIEF

Comes Now petitioner Richard Brown Arenas and petitions this Honorable Court and alleges as follows:

I.

Petitioner is an enrolled member of the Palm Springs Bank of Mission Indians.

II.

That on the 24th day of February, 1949, petitioner's mother, Eleuteria Brown Arenas, now deceased, received a trust patent to the following described lands which are situated within the Palm Springs Reservation in the City of Palm Springs, County of Riverside, State of California, to wit:

Parcel (a): Lot 50, Section 14, T4S, R4E, S.B.B.&M., comprising 2 acres.

Parcel (b): Tract No. 41 of Section 26, T4S, R4E, S.B.B.&M., comprising 5 acres. [22]

Parcel (c): SW¼ of the NE¼ of Section 26, T4S, R4E, S.B.B.&M., comprising 40 acres.

That said allotments were made effective and said trust patent was issued as effective nunc pro tunc so as to vest and become effective as of May 9, 1927, which was the date finally adjudicated as between the United States of America and allottee Eleuteria Brown Arenas as the date of the selection made for her for allotment of said lands.

III.

That attorneys John W. Preston, Oliver O. Clark and David D. Sallee represented said Eleuteria Brown Arenas in the commencement of the litigation in this proceeding entitled Eleuteria Brown Arenas, Plaintiff, vs. United States of America, Defendant, and numbered 6221-WM Civil. That on March 2, 1951, a judgment and supplemental decree was entered herein adjudging that said attorneys were jointly entitled to a judgment for legal services rendered by them in the obtaining of the allotment and trust patent described in paragraph II hereof in the principal amount of $25,750.00 together with costs in the amount of $15.00 and that a lien in the nature of a charging lien be impressed upon said lands and the whole thereof to secure the payment of said judgment. That said judgment was appealed by the United States of America to the Court of Appeals for the Ninth Circuit and was amended by reducing the principal amount of the judgment from $25,750.00 to $20,750.00. That as so amended, such judgment became final.

IV.

That Eleuteria Brown Arenas died intestate in Riverside County, California, on April 26, 1954, and the probate of her estate and the determination of her heirs at law was vested by law in and was determined by the Secretary of the Interior of the United States through his legally appointed Examiner of Inheritance, [23] J. Lee Rawhauser. That said determination was made pursuant to the provisions of Section 1 of the Act approved June 25, 1910, 36 Stat. 855; Title 25, U.S.C.A., Section 372. That said Examiner of Inheritance on June 7, 1954, found and determined that petitioner Richard Brown Arenas was the surviving son of and sole heir at law of Eleuteria Brown Arenas and entitled to inherit her allotted lands including those which are described in paragraph II hereof. That said Order Determining Heirs approved and ordered paid the following claims payable to the following named creditors in the following amounts:

Wiefels and Son, Funeral Directors, Box 359, Palm Springs, California .........$ 463.66

Mrs. Terry M. Lamb, 3826 East First Street, Long Beach 3, California....... 9,620.00
plus 6% interest from May 1, 1954

Bank of America, National Trust and Savings Association, Palm Springs, California (for promissory note dated February 10, 1954) .......................... 300.00
plus 6% interest from February 10, 1954

Bank of America, National Trust and Savings Association, Palm Springs, California, balance due on promissory note dated January 7, 1954, in amount of $321.60; present balance due unknown, since Sacramento Area Office has made payments thereon subsequent to decedent's death ........................

Hatchett's Market, Palm Springs, California .................................. 6.18

Desert Lock and Key, Palm Springs, California ................................ 15.51

California Electric Power Company, Palm Springs, California .................. 16.39

Palm Springs Water Company, Palm Springs, California .................. 4.60

Music and Appliance Company, Palm Springs, California .................. 28.62

That since the allowance of the claim in favor of Mrs. Terry M. Lamb, payments have been made by the Indian Office of the United States out of funds accruing in favor of petitioner Richard Brown [24] Arenas so that the unpaid balance of principal is now the sum of $8,657.96 plus interest at 6% per annum from October 21, 1955, until paid. That in addition to the accrual of interest, said claim arises out of a purchase contract of an improved residential structure and may be subject to forfeiture as against petitioner Richard Brown Arenas if not paid in accordance with the existing contract between Mrs. Lamb and said decedent. That for such

reason petitioner Richard Brown Arenas alleges that Mrs. Lamb should have priority payment thereon.

V.

That under compulsion of the judgment, order and decree in this cause ordering the sale of the lands which are described in paragraph II hereof and in order to avoid the hazard of a possible loss of all of said allotted lands through foreclosure sale, petitioner Richard Brown Arenas consummated five private sales of certain portions of said trust patented lands which he had inherited from his mother which are described as follows:

1. The S½ of the NW¼ of the SW¼ of the NE¼ of Section 26, T4S, R4E, S.B.B.&M., containing five acres, more or less.

2. The N½ of the NE¼ of the SW¼ of the NE¼ of Section 26, T4S, R4E, S.B.B.&M., containing five acres, more or less.

3. Beginning at a point on a right-of-way common to Camino Real and La Verne Way which is 40′ North along the center section line from the center section ¼ corner of Section 26, T4S, R4E, S.B.B.&M., County of Riverside, California, thence North along the center section line 618′; thence South 89° 54″ East 993.0′ to the Westerly right-of-way of La Verne Way; thence South 53° 50″ West 893.7′ along the Westerly right-of-way of La Verne Way; thence Westerly along [25] a 464.9′ radius curve on La Verne Way to the point of beginning, containing 7¾ acres, more or less.

4. Beginning at a point 329′ south of the NE corner of the SW¼ NE¼ (NE 1/16C) Section 26, T4S, R4E, proceed west 660′, thence south 329′, thence east 333′ to north right-of-way of La Verne Way, thence north 53° 53′ east 407.9′ along north right-of-way of said street, thence north 88.6′ to point of beginning, containing 4.08 acres, more or less.

5. The N½ of the NW¼ of the SW¼ of the NE¼ of Section 26, T4S, R4E, S.B.B.&M., comprising five acres.

That there was deposited in the registry of this Court as the net proceeds of such sales the sum of $40,285.60.

VI.

That by subsequent orders, judgments and decrees, this Court has caused to be paid and disbursed from said sum of $40,285.60, the total sum of $24,765.00, which disbursements have fully satisfied, paid and discharged the judgment and lien of attorneys Preston, Clark and Sallee except as to their claim for accrued interest. That petitioner Richard Brown Arenas, the United States of America and said attorneys Preston, Clark and Sallee have stipulated herein and this Court has ordered that the payment of interest upon the judgment in favor of said attorneys shall be governed by the final decree of the Court of Appeals for the Ninth Circuit in the appeal now pending in this Court as No. 14555 entitled United States of America, et. al., vs. Preston, et. al., and pursuant thereto

this Court has ordered and required that the sum of $6,301.40 be retained in the registry to secure payment of such interest if the same shall be required to be paid. That such disbursements have also fully paid, satisfied and discharged a fee for services rendered by counsel for petitioner [26] Richard Brown Arenas, Irl Davis Brett, Esq., for procuring and consummating such private sales including the legal steps taken in this cause to obtain authorization and approval thereof and all costs of suit in this cause to date.

VII.

That in order to consummate the private sales heretofore described and set forth, petitioner Richard Brown Arenas obtained an order and judgment of this Court approving such sales by the terms of which it was provided, inter alia, that the lien of the judgment and supplemental decree in favor of attorneys Preston, Clark and Sallee and all other lawful and outstanding liens upon the lands so sold were transferred from said lands to the funds deposited in the registry of the Court. That in order to consummate said sales it was necessary that petitioner Richard Brown Arenas obtain and supply to the purchasers policies of title insurance issued by private title insurance companies operating and doing business in the County of Riverside, California, and in order to obtain and supply such policies of title insurance it was necessary for petitioner Richard Brown Arenas to and he did obtain releases of any claimed estate tax lien of the United States of America affecting the lands described in para-

graph II hereof which he had inherited from his deceased mother, Eleuteria Brown Arenas, together with a release of the State Inheritance Tax lien, if any, in favor of the State of California upon said lands, conditioned that said liens, if any there were, be transferred and affixed to the funds deposited in the registry of the Court.

VIII.

That petitioner is informed and believes and upon such ground alleges that the United States of America claims that the right of petitioner Richard Brown Arenas to succeed to his mother's interest in the lands described in paragraph II hereof is subject to an estate tax under allegedly applicable laws of the United States. [27] That if such claim is established, it is a lien upon the funds now on deposit in the registry of the Court pursuant to the judgments, orders and decrees heretofore made by this Court in authorizing and approving the sales hereinbefore described. That petitioner denies that any such estate tax is leviable or lawful and alleges that since such succession right is solely and exclusively derived through the General Allotment Act of 1887 (the Act approved February 8, 1887, chapter 119, paragraph 5; 24 Stat. 389; Title 25 U.S.C., Section 348) and the Mission Indian Act of 1891 (the Act approved January 12, 1891; 26 Stat. 712) both as amended, the right of petitioner to such inherited allotted lands is not derived through general succession but through special suc-

cession in fulfillment of the obligation of the United States that the restricted trust patented property shall be held free of all charge and encumbrance whatsoever, whether voluntary or involuntary, made or incurred by the trust patentee. That the conversion of a portion of such trust patented inherited lands through the sales thereof with the approval of this Court and the United States under compulsion of the decrees of this Court as heretofore described and set forth did not change the trust character of or limitations upon the funds into which they were converted, and which funds are now on deposit in the registry of the Court in this action, and that no succession tax or any other tax by the United States of America could be levied upon or affixed to or has been levied upon or affixed to such trust restricted funds.

IX.

That petitioner is informed and believes and upon such ground alleges that the State of California claims that his right to succeed to his mother's interest in the lands described in paragraph II hereof is subject to an inheritance tax under allegedly applicable laws of said State. That if said claim [28] is established, it is a lien upon the funds now on deposit in the registry of the Court pursuant to the judgments, orders and decrees heretofore made by this Court in authorizing and approving the sales hereinbefore described. That petitioner denies that any such inheritance tax is leviable or lawful and alleges that since such

succession rights are solely and exclusively derived through the General Allotment Act of 1887 (the Act approved February 8, 1887, chapter 119, paragraph 5; 24 Stat. 389; Title 25 U.S.C., Section 348) and the Mission Indian Act of 1891 (the Act approved January 12, 1891; 26 Stat. 712) both as amended, the right of petitioner to such inherited allotted lands is not derived through general succession but through special succession in fulfillment of the obligation of the United States that the restricted trust patented property shall be held free of all charge and encumbrance whatsoever, whether voluntary or involuntary, made or incurred by the trust patentee. That the conversion of a portion of such trust patented inherited lands through the sales thereof with the approval of this Court and the United States under compulsion of the decrees of this Court as heretofore described and set forth did not change the trust character of or limitations upon the funds into which they were converted, and which funds are now on deposit in the registry of the Court in this action, and that no succession tax or any other tax by the State of California could be levied upon or affixed to or has been levied upon or affixed to such trust restricted funds. Petitioner further alleges that the adoption of the laws governing heirship of the State of California as the requirement for inheritance of said allotted trust patented lands under the provisions of the Acts of Congress immediately heretofore referred to and described did not make such lands subject to a State inheritance tax nor make inheritance thereto

subject to the laws of the State of California but that, to the contrary, such adoption was merely a convenient means for the Congress to [29] express its will and was descriptive only of the will of Congress as expressed in such legislation.

X.

That Irl Davis Brett, Esq., has prepared this petition and the Order to Show Cause to be issued thereon and has prepared a brief upon the law in respect to the issues presented thereby and has been employed to and will represent petitioner until the conclusion of such proceedings. That the questions with respect to taxation are novel and intricate and the amount of work which said attorney will be required to perform may vary considerably, dependent upon the responses to the Order to Show Cause which will be issued upon the petition and the issues raised thereby. That petitioner has no other funds with which to pay or reimburse said attorney and therefore requests that a reasonable sum be retained in the registry of the Court pending final determination of the issues herein raised and to be raised and the performance of such legal services in his behalf by said attorney to secure payment of his services.

Wherefore, petitioner respectfully prays:

1. That this Court determine that the United States of America has no tax obligation or lien against petitioner and that the funds on deposit in

the registry of the Court in this cause are not subject to any lien in its favor.

2. That this Court determine that the State of California has no tax obligation or lien against petitioner and that the funds on deposit in the registry of the Court in this cause are not subject to any lien in its favor.

3. That this Court order and direct that there be paid out of the funds allotted to petitioner Richard Brown Arenas the approved claims against the estate of Eleuteria Brown Arenas, deceased. [30]

4. That this Court fix and determine such reasonable sum as will secure the payment of advances made and to be made by petitioner's counsel, Irl Davis Brett, Esq., and for his services rendered and to be rendered herein for which payment has not already been made and that such sum as so fixed be retained in the registry of the Court as security for such payment until the further order of the Court.

5. That the remaining funds be distributed to petitioner.

6. For such other and further and general relief as in equity ought to be granted.

That an Order to Show Cause be issued herein requiring that the United States of America and the State of California, and each of them, be and appear before this Court on such date, time and at such place as the Court shall fix and determine and

set forth in said Order to Show Cause, then and there each to show cause why this Court should not make the orders herein prayed for.

Dated:

/s/ IRL D. BRETT,
Attorney for Petitioner.

Duly verified.

[Endorsed]: Filed December 5, 1955. [31]

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[Title of District Court and Cause.]

No. 1321-WM Civil

## ANSWER

Comes Now the respondent Robert C. Kirkwood, Controller of the State of California, and answers as follows:

I.

Admits each and every allegation set forth in paragraphs I, II, and V.

II.

Respondent has no information or belief upon the subject sufficient to enable him to answer and on this ground denies each and every allegation set forth in paragraphs IV, VI, VII, VIII, IX, X, XII, XIV, XV, XVII, XVIII, XIX, XX, XXII, and XXIII.

III.

Admits all the allegations of paragragh III except as to the marital status of Guadalupe Rice Arenas and Lee Arenas and as to those allegations lacks information or belief upon the subject sufficient to enable the respondent to answer and on this ground denies each and every allegation relating to marital status. [32]

IV.

As to paragraph VI admits that Guadalupe Rice Arenas died but lacks information or belief upon the subject sufficient to answer the other allegations of said paragraph and on this ground denies each and every other allegation set forth in said paragraph VI.

V.

As to paragraph XI admits that the proceeds of sales of certain lands were deposited in the registry of this Court but lacks information or belief upon the subject sufficient to enable the respondent to answer and on this ground denies each and every other allegation in paragraph XI.

VI.

As to paragraph XIII admits that Eleuteria Brown Arenas died in Riverside County on April 26, 1954, but lacks information or belief upon the subject sufficient to enable him to answer as to the other allegations set forth in said paragraph XIII and on this ground denies each and every other allegation set forth in said paragraph XIII.

VII.

As to paragraph XVI admits the allegation that the petitioners obtained releases of the inheritance tax lien on the lands held by the petitioners, on condition that said lien be transferred and affixed to the funds deposited in the registry of the Court and as to the other allegations of said paragraph the respondent lacks information or belief upon the subject sufficient to enable respondent to answer and on this ground denies each and every other allegation set forth in said paragraph XVI.

VIII.

As to paragraph XXI admits that an inheritance tax is due the State of California by reason of the death of Guadalupe Rice Arenas and by the death of Eleuteria Brown Arenas and that said [33] taxes are a lien upon the funds now on deposit in this Court but lacks information or belief upon the subject to enable respondent to answer and on this ground denies each and every other allegation set forth in said paragraph XXI.

Wherefore, respondent respectfully prays:

1. That this Court determine that a lien for inheritance taxes due to the State of California exists upon the moneys now on deposit in the registry of this Court by reason of the death of Guadalupe Rice Arenas and Eleuteria Brown Arenas.

2. For such other further and general relief as in equity ought to be granted.

Dated: January 31, 1956.

JAMES W. HICKEY,
WALTER H. MILLER, and
VINCENT J. McMAHON;

By /s/ WALTER H. MILLER,
Attorneys for Robert C. Kirkwood, Controller of the State of California.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1956. [34]

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[Title of District Court and Cause.]

No. 6221—WM Civil

ANSWER

Comes Now the respondent Robert C. Kirkwood, Controller of the State of California, and answers as follows:

I.

Admits each and every allegation set forth in paragraphs I and II.

II.

Respondent has no information or belief upon the subject sufficient to enable him to answer and on this ground denies each and every allegation set forth in paragraphs III, VI, VIII, and X.

III.

As to paragraph IV admits that Eleuteria Brown Arenas died in Riverside County, on April 26, 1954, but lacks information or belief upon the subject sufficient to enable him to answer as to the other allegations set forth in said paragraph IV and on this ground denies each and every other allegation set forth in [36] said paragraph IV.

IV.

As to paragraph V admits that the proceeds of sales of certain lands were deposited in the registry of this Court but lacks information or belief upon the subject sufficient to enable the respondent to answer and upon this ground denies each and every other allegation in paragraph V.

V.

As to paragraph VII admits the allegation that the petitioners obtained releases of the inheritance tax lien on the lands held by the petitioners on condition that said lien be transferred and affixed to the funds deposited in the registry of the Court and as to the other allegations of said paragraph the respondent lacks information or belief upon the subject sufficient to enable respondent to answer and on this ground denies each and every other allegation set forth in said paragraph VII.

VI.

As to paragraph IX admits that an inheritance tax is due the State of California by reason of the

death of Guadalupe Rice Arenas and Eleuteria Brown Arenas and that said taxes are a lien upon the funds now in the registry of the Court, but lacks information or belief upon the subject sufficient to enable respondent to answer as to the other allegations of said paragraph and on this ground denies each and every other allegation set forth in said paragraph IX.

Wherefore, respondent respectfully prays:

1. That this Court determine that a lien for inheritance taxes due to the State of California exists upon the moneys now on deposit in the registry of this Court by reason of the death of Guadalupe Rice Arenas and Eleuteria Brown Arenas. [37]

2. For such other further and general relief as in equity ought to be granted.

Dated: January 31, 1956.

JAMES W. HICKEY,
WALTER H. MILLER, and
VINCENT J. McMAHON;

By /s/ WALTER H. MILLER,

Attorneys for Robert C. Kirkwood, Controller of the State of California.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed January 31, 1956. [38]

[Title of District Court and Cause.]

No. 1321—WM Civil

## REPLY TO PETITION FOR DETERMINATION OF TAXES, ETC.

Comes now the defendant, United States of America, by its attorneys, Laughlin E. Waters, United States Attorney, and Richard A. Lavine, Assistant U. S. Attorney, and by way of reply to Plaintiff's Petition for Determination of Taxes, etc., filed December 5, 1955, admits, denies, and alleges as follows:

I.

With reference to Pragraph I, admits the allegations therein.

II.

With reference to Paragraph II, in the Department of Interior schedule of allotments, parcel (a) is described as "block" rather than "lot"; and parcel (b) is described as "lot" rather than "tract." Except as hereinabove set forth, admits the allegations therein.

III.

With reference to Paragraph III, in the Department of [40] Interior schedule of allotments, parcel (a) is described as "block" rather than "lot"; and parcel (b) is described as "lot" rather than "tract." Except as hereinabove set forth, admits the allegations therein.

IV.

With reference to Paragraph IV, admits the allegations therein.

V.

With reference to Paragraph V, admits the allegations therein.

VI.

With reference to Paragraph VI, admits the allegations therein.

VII.

With reference to Paragraph VII, admits the allegations therein.

VIII.

With reference to Paragraph VIII, admits the allegations therein.

IX.

With reference to Paragraph IX, admits the allegations therein.

X.

With reference to Paragraph X, wherever the word "lot" appears, the reference should be to the word "block." That as to the S½ of Lot 40 in Section 26, the partition of same was made to Richard Brown Arenas after the death of his mother, Eleuteria Brown Arenas, as the heir to the estate of Eleuteria Brown Arenas. Except as stated hereinabove, admits all other allegations therein.

XI.

With reference to Paragraph XI, admits the allegations therein. [41]

XII.

With reference to Paragraph XII, admits the allegations therein.

XIII.

With reference to Paragraph XIII, alleges that the records of the Area Office of the Bureau of Indian Affairs shows that the Examiner of Inheritance allowed two claims of the Bank of America National Trust and Savings Association, one in the amount of $300.00, plus interest, as set forth in Paragraph XIII, and a second claim based on a promissory note dated January 7, 1954, showing a balance due of $288.39, both of which claims have been paid. All of the claims set forth in Paragraph XIII have been allowed and paid except the claim of Mrs. Terry M. Lamb. Except as set forth hereinabove, admits the allegations therein.

XIV.

With reference to Paragraph XIV, admits the allegations therein.

XV.

With reference to Paragraph XV, admits the allegations therein.

XVI.

With reference to Paragraph XVI, admits the allegations therein.

XVII.

With reference to Paragraph XVII, admits the allegations therein.

XVIII.

With reference to Paragraph XVIII, admits the allegations therein.

XIX.

With reference to Paragraph XIX, denies that if the right to succession of trust patented Indian lands in the Palm Springs [42] Indian Reservation is taxable by the United States of America, such right to tax is derived from judicial decision made or entered after the death of Guadalupe Rice Arenas. Admits all allegations not denied.

XX.

With reference to Paragraph XX, the office of the Director of Internal Revenue is completing its investigation to determine whether a lien should be asserted against the funds presently deposited in the registry of the court arising because of Federal Estate Taxes that may be due. Attorneys for defendant United States of America, are informed that such determination should be made prior to the date of the hearing of this petition. Defendant respectfully asks leave of court to amend or supplement this reply to petition, in order to set forth at such later time whether the United States of America does or does not assert a lien against the funds presently in the registry of the court.

Except for a determination as to whether the United States may assert a lien, and the extent of any such lien, against the funds presently in the registry of this court, the District Court does not

have jurisdiction in this action to determine whether there is any tax obligation due to the United States by petitioner or other persons arising by reason of the death of Eleuteria Brown Arenas.

XXI.

With reference to Paragraph XXI, defendant United States of America, agrees with the contention of the petition to the extent that no inheritance tax is due to the State of California by reason of the nature of the property transferred by way of inheritance, and that such property transferred is free from state inheritance taxes by virtue of the laws of the United States applicable to such property; and that there is no valid or existing lien of the State of California upon the funds in the registry of the court in this [43] action by virtue of any state inheritance taxes.

XXII.

With reference to Paragraph XXII, defendant does not admit that Mrs. Terry M. Lamb should have priority of payment over taxes, if any, which may be due. Except as set forth hereinabove, admits the other allegations set forth therein.

XXIII.

With reference to Paragraph XXIII, defendant United States of America, has no information or knowledge sufficient to form a belief as to the amount of advances made by attorney for peti-

tioner, Lee Arenas, allegedly in the sum of $92.38. Defendant takes no position upon the question of additional attorneys' fees at this time, and requests the court that it may reserve any objections to additional attorneys' fees until such time as a petition is presented to the court in which there is set forth the exact amount of fees requested and the nature and amount of work done by attorney for petitioners. Defendant has no objection to the court retaining in the registry of the court a reasonable sum for such attorneys fees, if any, that the court may later determine is due to attorney for petitioners.

XXIV.

Defendant is informed and believes and upon such information and belief alleges as follows: That petitioner Richard Brown Arenas, has been convicted of a felony by the State of California; that subsequent to such conviction he has been released from custody upon parole; that he has violated the conditions of such parole; and by reason thereof he has been reincarcerated in a California penal institution to finish serving his original sentence, and is presently incarcerated.

Defendant United States of America, recommends that any funds due to him not be distributed directly to him at this time, but that such funds be placed in trust for petitioner with the Area [44] Director, Sacramento Office, Bureau of Indian Affairs, as trustee, in a trust account, which trust account for petitioner is already in existence.

Wherefore defendant United States of America, respectfully prays:

1. That this court determine that the State of California has no lien with reference to petitioners, upon the funds deposited in the registry of this court.

2. That the court order and direct that there be paid out of the funds allocated to petitioner Richard Brown Arenas, the approved claim of Mrs. Terry M. Lamb, against the estate of Eleuteria Brown Arenas, deceased.

3. That the remaining funds allocated to petitioner Richard Brown Arenas, be distributed to the Area Director, Sacramento Office, Bureau of Indian Affairs, as trustee, in trust for petitioner Richard Brown Arenas, to be placed in a trust account presently in existence for said petitioner, in accordance with regulations of the Department of the Interior (25 C.F.R., Part 221).

4. That the remaining funds allocated to petitioner Lee Arenas, be distributed to such petitioner.

5. That defendant United States of America, be permitted to amend this reply to assert whether or not it claims any lien against the funds in the registry of the court because of Federal Estate Taxes that may be due.

6. For such other and further relief as may be proper.

Dated: January 31, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,

By /s/ RICHARD A. LAVINE,
Attorneys for Defendant
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed February 1, 1956. [45]

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[Title of District Court and Cause.]

No. 6221—WM Civil

## REPLY TO PETITION FOR DETERMINATION OF TAXES, ETC.

Comes now the defendant, United States of America, by its attorneys, Laughlin E. Waters, United States Attorney, and Richard A. Lavine, Assistant U. S. Attorney, and by way of reply to Plaintiff's Petition for Determination of Taxes, etc., filed December 5, 1955, admits, denies, and alleges as follows:

I.

With reference to Paragraph I, admits the allegations therein.

II.

With reference to Paragraph II, in the Department of Interior schedule of allotments, parcel (a)

is described as "block" rather than "lot"; and parcel (b) is described as "lot" rather than "tract." Except as hereinabove set forth, admits the allegations therein.

III.

With reference to Paragraph III, admits the allegations [47] therein.

IV.

With reference to Paragraph IV, alleges that the records of the Area Office of the Bureau of Indian Affairs shows that the Examiner of Inheritance allowed two claims of the Bank of America, National Trust and Savings Association, one in the amount of $300 plus interest, as set forth in Paragraph IV, and a second claim based on a promissory note, dated January 7, 1954, showing a balance due of $288.39, both of which claims have been paid. All of of the claims set forth in Paragraph IV have been allowed and paid except the claim of Mrs. Terry M. Lamb. The principal due and the amount of interest paid to Mrs. Terry M. Lamb are correctly set forth in the petition. Defendant does not admit that Mrs. Terry M. Lamb should have priority of payment over taxes, if any, which may be due. Except as set forth hereinabove, admits the other allegations set forth in Paragraph IV.

V.

With reference to Paragraph V, line 31, page 4, the bearing should read "South 53° 52″, instead of

"South 53° 50″ as set forth in the petition. Except as set forth hereinabove, admits the other allegations set forth in Paragraph V.

VI.

With reference to Paragraph VI, admits the allegations therein.

VII.

With reference to Paragraph VII, admits the allegations therein.

VIII.

With reference to Paragraph VIII, the office of the Director of Internal Revenue is completing its investigation to determine whether a lien should be asserted against the funds presently deposited in the registry of the court arising because of [48] Federal Estate Taxes that may be due. Attorneys for defendant, United States of America, are informed that such determination should be made prior to the date of the hearing of this petition. Defendant respectfully asks leave of court to amend or supplement this reply to petition, in order to set forth at such later time whether the United States of America does or does not assert a lien against the funds presently in the registry of the court.

Except for a determination as to whether the United States of America may assert a lien, and the extent of any such lien, against the funds presently in the registry of this court, the District Court does not have jurisdiction in this action to determine whether there is any tax obligation due to the

United States by petitioner, or other persons, arising by reason of the death of Eleuteria Brown Arenas.

IX.

With reference to Paragraph IX, the defendant, United States of America, agrees with the contention of the petition, to the extent that no inheritance tax is due to the State of California by reason of the nature of the property transferred by way of inheritance, and that such property transferred is free from state inheritance taxes by virtue of the laws of the United States applicable to such property; and that there is no valid or existing lien of the State of California upon the funds in the registry of the court in this action by virtue of any state inheritance taxes or other cause whatsoever.

X.

With reference to Paragraph X, defendant United States of America, takes no position upon the question of additional attorneys' fees at this time, and requests the court that it may reserve any objections to additional attorneys' fees until such time as a petition is presented to the court in which there is set forth the exact amount of fees requested, and the nature and amount [49] of work done by attorney for petitioner. Defendant has no objection to the court retaining in the registry of the court a reasonable sum for such attorney fees, if any, that the court may later determine is due to attorney for petitioner.

XI.

Defendant is informed and believes and upon such information and belief alleges as follows: That petitioner Richard Brown Arenas, has been convicted of a felony by the State of California; that subsequent to such conviction he has been released from custody upon parole; that he has violated the conditions of such parole; and by reason thereof he has been reincarcerated in a California penal institution to finish serving his original sentence, and is presently incarcerated.

Defendant United States of America, recommends that any funds due to him not be distributed directly to him at this time, but that such funds be placed in trust for petitioner with the Area Director, Sacramento Office, Bureau of Indian Affairs, as trustee, in a trust account, which trust account for petitioner is already in existence.

Wherefore defendant United States of America, respectfully prays:

1. That this court determine that the State of California has no lien with reference to petitioner, upon the funds deposited in the registry of this court.

2. That this court order and direct that there be paid out of the funds alloted to petitioner Richard Brown Arenas, the approved claim of Mrs. Terry M. Lamb, against the estate of Eleuteria Brown Arenas, deceased.

3. That the remaining funds be distributed to the Area Director, Sacramento Office, Bureau of Indian Affairs, as trustee in trust for petitioner Richard Brown Arenas, to be placed in a trust account presently in existence for said petitioner, in [50] accordance with existing regulations of the Department of the Interior (25 C.F.R., Part 221).

4. That defendant United States of America, be permitted to amend this reply to assert whether or not defendant claims any lien against the funds in the registry of this court because of Federal Estate Taxes that may be due.

5. For such other and further relief as may be proper.

Dated: January 31, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

By /s/ RICHARD A. LAVINE,
Attorneys for Defendant
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed February 1, 1956. [51]

[Title of District Court and Cause.]

No. 1321—WM Civil

## AMENDED ANSWER, STIPULATION THEREON, AND ORDER THEREON

Comes Now the respondent Robert C. Kirkwood, Controller of the State of California, and files as follows his amended answer to supersede entirely the answer previously filed herein on January 31, 1956, and admits, denies and alleges as follows:

I.

With reference to Paragraph I admits the allegations therein.

II.

With reference to Paragraph II admits the allegations therein.

III.

Admits the allegations of Paragraph III except as to the marital status of Guadalupe Rice Arenas and Lee Arenas and as to those allegations lacks information or belief upon the subject sufficient to enable the respondent to answer and on this ground denies each and every allegation as to marital status. [53]

IV.

With reference to Paragraph IV admits the allegations therein.

V.

With reference to Paragraph V admits the allegations therein.

VI.

With reference to Paragraph VI admits that Guadalupe Rice Arenas died, but lacks information or belief upon the subject sufficient to answer whether she died intestate; Denies that the probate of her estate and the determination of her heirs was vested by law in the Secretary of Interior; Denies that Eleuteria Brown Arenas was the adopted daughter of petitioner Lee Arenas and the said Guadalupe Rice Arenas within the meaning of Section 13307 of the Revenue and Taxation Code of California so as to qualify her as a Class A transferee; Admits that the Secretary of Interior through his Examiner made a determination and that his findings were as set forth in said Paragraph VI but denies that such findings are binding upon the State of California in determining the inheritance taxes due to the State of California by reason of the death of Guadalupe Rice Arenas and Eleuteria Brown Arenas.

VII.

With reference to Paragraph VII admits the allegations therein.

VIII.

With reference to Paragraph VIII admits the allegations therein.

IX.

With reference to Paragraph IX admits the allegations therein.

X.

With reference to Paragraph X admits the allegations [54] therein.

XI.

With reference to Paragraph XI admits the allegations therein.

XII.

With reference to Paragraph XII admits the allegations therein.

XIII.

With reference to Paragraph XIII admits that Eleuteria Brown Arenas died in Riverside County, on April 26, 1954, but lacks information or belief upon the subject sufficient to determine if she died intestate and on this ground denies that she died intestate; Denies that the probate of her estate and the determination of her heirs was vested by law in the Secretary of Interior; Admits that the Secretary of Interior through his Examiner made a determination and that he determined the facts as alleged in Paragraph XIII but denies that such findings are binding upon the State of California in determining the inheritance taxes due to the State of California by reason of the death of Guadalupe Rice Arenas and Eleuteria Brown Arenas.

XIV.

With reference to Paragraph XIV admits the allegations therein.

XV.

With reference to Paragraph XV admits the allegations therein.

XVI.

With reference to Paragraph XVI admits the allegations therein.

XVII.

With reference to Paragraph XVII admits the allegations therein except as to whether Eleuteria Brown Arenas was the mother [55] of Richard Brown Arenas and whether Guadalupe Rice Arenas was the grandmother of the said Richard Brown Arenas and as to these allegations lacks information or belief upon the subject sufficient to answer and on this ground denies said allegations.

XVIII.

With reference to Paragraph XVIII admits the allegations therein except as to whether Eleuteria Brown Arenas was the mother of Richard Brown Arenas and whether Guadalupe Rice Arenas was the grandmother of the said Richard Brown Arenas and as to these allegations lacks information or belief upon the subject sufficient to answer and on this ground denies said allegations.

XIX.

With reference to Paragraph XIX denies that the right of the State of California to tax the trust patented Indian lands in the Palm Springs Reservation is derived from judicial decisions made or entered after the death of Guadalupe Rice Arenas; Denies that all administrative action through which the allotment was approved for and a trust patent was issued to the heirs and devisees of Guadalupe Rice Arenas occurred and took place after her death; Denies that at the time of Guadalupe Rice

Arenas' death the selections for allotments of Palm Springs Indian Reservation lands which had been made by various enrolled members in 1923 and 1927 including the selection made by Guadalupe Rice Arenas had been rejected by the Secretary of Interior; Admits the other allegations therein.

XX.

With reference to Paragraph XX lacks information or belief upon the subject sufficient to answer the allegations therein and upon this ground denies the allegations therein.

XXI.

With reference to Paragraph XXI admits and alleges that inheritance taxes are due the State of California by reason of the [56] death of Guadalupe Rice Arenas and by reason of the death of Eleuteria Brown Arenas and that said taxes are a lien upon the funds now on deposit in this Court. As to the other allegations of said Paragraph XXI lacks information or belief upon the subject sufficient to enable the respondent to answer and on this ground denies each and every other allegation of said paragraph.

XXII.

With reference to Paragraph XXII lacks information or belief upon the subject sufficient to answer the allegations thereof and upon this ground denies the allegations set forth in said Paragraph XXII.

XXIII.

With reference to Paragraph XXIII lacks information or belief upon the subject sufficient to answer the allegations thereof and upon this ground denies each and every allegation set forth in said Paragraph XXIII.

Wherefore, respondent respectfully prays:

1. That this Court determine that a lien for inheritance taxes due to the State of California exists upon the moneys now on deposit in the registry of this Court by reason of the deaths of Guadalupe Rice Arenas and Eleuteria Brown Arenas.

2. For such other further and general relief as in equity ought to be granted.

Dated: February 20, 1956.

JAMES W. HICKEY,
WALTER H. MILLER, and
VINCENT J. McMAHON;

By /s/ VINCENT J. McMAHON,
Attorneys for State Controller.

STIPULATION

It is hereby agreed and stipulated by and between petitioners Lee Arenas and Richard Brown Arenas, and defendant Robert C. Kirkwood, the Controller of the State of California, by their respective counsel of record, that said defendant may file the above Amended Answer to Petition for Determination of Taxes, etc., subject to approval of court.

Dated: February 20th, 1956.

/s/ IRL D. BRETT,
Attorney for Petitioners.

JAMES W. HICKEY,
WALTER H. MILLER, and
VINCENT J. McMAHON;

By /s/ VINCENT J. McMAHON,
Attorneys for State Controller.

Order

The foregoing stipulation is approved, and defendant Robert C. Kirkwood, the Controller of the State of California, may file his Amended Answer to Petition for Determination of Taxes, etc.

Dated: February 20, 1956.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed February 20, 1956. [58]

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[Title of District Court and Cause.]

No. 6221—WM Civil

AMENDED ANSWER, STIPULATION THEREON, AND ORDER THEREON

Comes Now the respondent Robert C. Kirkwood, Controller of the State of California, and files as follows his amended answer to supersede entirely

the answer previously filed herein on January 31, 1956, and admits, denies and alleges as follows:

I.

With reference to Paragraph I admits the allegations therein.

II.

With reference to Paragraph II admits the allegations therein.

III.

With reference to Paragraph III admits the allegations therein.

IV.

With reference to Paragraph IV admits that Eleuteria Brown Arenas died in Riverside County, on April 26, 1954, but lacks [59] information or belief upon the subject sufficient to determine if she died intestate and on that ground denies that she died intestate; Denies that the probate of her estate and the determination of her heirs was vested by law in the Secretary of Interior; Admits that the Secretary of Interior through his Examiner made a determination and that he determined the facts as alleged in Paragraph IV but denies that such findings are binding upon the State of California in determining the inheritance taxes due to the State of California by reason of the death of Guadalupe Rice Arenas and Eleuteria Brown Arenas; As to the other allegations of said paragraph lacks information or belief upon the subject sufficient to answer and upon this ground denies the other allegations of said Paragraph IV.

V.

With reference to Paragraph V admits the allegations thereof except as to the relationship of Richard Brown Arenas to Eleuteria Brown Arenas and as to this allegation respondent lacks information or belief upon the subject sufficient to answer and upon this ground denies the relationship between said parties as being son and mother.

VI.

With reference to Paragraph VI admits the allegations therein.

VII.

With reference to Paragraph VII admits the allegations therein.

VIII.

With reference to Paragraph VIII lacks information or belief upon the subject sufficient to enable respondent to answer and upon such ground denies the allegations of Paragraph VIII.

IX.

With reference to Paragraph IX admits and alleges that [60] inheritance taxes are due the State of California by reason of the death Eleuteria Brown Arenas and that said taxes are a lien upon the funds now on deposit in this Court; As to the other allegations of said Paragraph IX respondent lacks information or belief upon the subject sufficient to answer and upon this ground denies each and every other allegation of said Paragraph.

X.

With reference to Paragraph X lacks information or belief upon the subject sufficient to answer and upon this ground denies the allegations of said Paragraph X.

Wherefore, respondent respectfully prays:

1. That this Court determine that a lien for inheritance taxes due to the State of California exists upon the moneys now on deposit in the registry of this Court by reason of the death of Guadalupe Rice Arenas and Eleuteria Brown Arenas.

2. For such other further and general relief as in equity ought to be granted.

Dated: February 20, 1956.

JAMES W. HICKEY,
WALTER H. MILLER,
VINCENT J. McMAHON,

By /s/ VINCENT J. McMAHON,
Attorneys for State Controller.

STIPULATION

It is hereby agreed and stipulated by and between petitioner Richard Brown Arenas, and defendant Robert C. Kirkwood, the Controller of the State of California, by their respective counsel of record, that said defendant may file the above Amended Answer to Petition for Determination of Taxes, etc., subject to approval of court.

Dated: February 20, 1956.

/s/ IRL D. BRETT,
Attorney for Petitioner.

JAMES W. HICKEY,
WALTER H. MILLER,
VINCENT J. McMAHON,

By /s/ VINCENT D. McMAHON,
Attorneys for State Controller.

ORDER

The foregoing stipulation is approved, and defendant Robert C. Kirkwood, the Controller of the State of California, may file his Amended Answer to Petition for Determination of Taxes, etc.

Dated: February 20, 1956.

/s/ WM. C. MATHES,
United States District Judge.

[Endorsed]: Filed February 20, 1956. [62]

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[Title of District Court and Cause.]

No. 1321-WM Civil

NOTICE OF PENDENCY OF OTHER ACTION

Comes now the defendant United States of America, by its attorneys, Laughlin E. Waters, United

States Attorney; and Richard A. Lavine, Assistant U. S. Attorney; and in accordance with Rule 35 of Local Rules—Southern District of California, states as follows:

1. There has been filed in the Superior Court of the State of California, in and for the County of Riverside, a Petition for Determination of Inheritance Tax in the matter of Guadalupe Rice Arenas, Deceased, by Robert C. Kirkwood, as Controller of the State of California, Petitioner, vs. Lee Arenas and Eleuteria Brown Arenas, Respondents, No. Indio 906, to appoint an Inheritance Tax Appraiser to determine facts concerning certain alleged transfers of property, and to fix the tax due from Lee Arenas and Eleuteria Brown Arenas pursuant to the provisions of Article 2, Chapter 11, of the Inheritance Tax Law of California. [63]

2. There has been filed in the Superior Court of the State of California, in and for the County of Riverside, a Petition for Determination of Inheritance Tax in the matter of Eleuteria Brown Arenas, Deceased, by Robert C. Kirkwood, as Controller of the State of California, Petitioner, vs. Richard Brown Arenas, Respondent, No. Indio 907, to appoint an Inheritance Tax Appraiser to determine facts concerning certain alleged transfers of property, and to fix the tax due from Richard Brown Arenas pursuant to the provisions of Article 2, Chapter 11, of the Inheritance Tax Law of California.

Such documents were filed in said Superior Court on April 20, 1956.

Dated: April 26, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney;

By /s/ RICHARD A. LAVINE,
Attorneys for Defendant
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed April 26, 1956. [64]

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[Title of District Court and Cause.]

No. 6221-WM Civil

## NOTICE OF PENDENCY OF OTHER ACTION

Comes now the defendant United States of America, by its attorneys, Laughlin E. Waters, United States Attorney, and Richard A. Lavine, Assistant U. S. Attorney, and in accordance with Rule 35 of Local Rules—Southern District of California, states as follows:

1. There has been filed in the Superior Court of the State of California, in and for the County of

Riverside, a Petition for Determination of Inheritance Tax in the matter of Guadalupe Rice Arenas, Deceased, by Robert C. Kirkwood, as Controller of the State of California, Petitioner, vs. Lee Arenas and Eleuteria Brown Arenas, Respondents, No. Indio 906, to appoint an Inheritance Tax Appraiser to determine facts concerning certain alleged transfers of property, and to fix the tax due from Lee Arenas and Eleuteria Brown Arenas pursuant to the provisions of Article 2, Chapter 11, of the Inheritance Tax Law of California. [66]

2. There has been filed in the Superior Court of the State of California, in and for the County of Riverside, a Petition for Determination of Inheritance Tax in the matter of Eleuteria Brown Arenas, Deceased, by Robert C. Kirkwood, as Controller of the State of California, Petitioner, vs. Richard Brown Arenas, Respondent, No. Indio 907, to appoint an Inheritance Tax Appraiser to determine facts concerning certain alleged transfers of property, and to fix the tax due from Richard Brown Arenas pursuant to the provisions of Article 2, Chapter 11, of the Inheritance Tax Law of California.

Such documents were filed in said Superior Court on April 20, 1956.

Dated: April 26, 1956.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,

By /s/ RICHARD A. LAVINE,
Attorneys for Defendant
United States of America.

Affidavit of service by mail attached.

[Endorsed]: Filed April 26, 1956. [67]

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United States District Court for the Southern District of California, Central Division

No. 1321-WM Civil

LEE ARENAS,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

No. 6221-WM Civil

ELEUTERIA BROWN ARENAS,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

MEMORANDUM OF DECISION

IRL DAVIS BRETT, ESQUIRE,
Attorney for Plaintiff and Petitioner Lee Arenas, and Petitioner Richard Brown Arenas.

LAUGHLIN E. WATERS,
United States Attorney;
RICHARD A. LAVINE,
Assistant United States Attorney;
Attorneys for Defendant United States of America.

JAMES W. HICKEY,
WALTER H. MILLER, and
VINCENT J. McMAHON,
Attorneys for Claimant Robert C. Kirkwood, Controller of the State of California.

EDMUND G. BROWN,
Attorney General;
JAMES C. MAUPIN,
Deputy Attorney General;
Attorneys for Claimants, The People of the State of California, and the Franchise Tax Board of the State of California. [70]

Mathes, District Judge.

The State of California seeks to impress upon certain funds on deposit in the Registry of this Court a lien for alleged inheritance taxes claimed to be due the State, "by reason of the death of Guadalupe Rice Arenas (wife of Lee Arenas) and by reason of the death of Eleuteria Brown Arenas (adopted daughter of Lee and Guadalupe Arenas) * * *" (Cal. Rev. & T. Code § 13401 et seq.)

The funds in controversy are remnants of larger funds derived from sales, with the consent of the United States (25 U.S.C. § 392), of a portion of the lands within the Palm Springs Reservation of the Agua Caliente Band of Mission Indians previously allotted to Lee Arenas and to the heirs of Guadalupe, meantime deceased, pursuant to § 4 of the Mission Indian Act. (26 Stat. 712 (1891); see: 24 Stat. 388 (1887); 36 Stat. 859 (1910); 39 Stat. 969, 976 (1917).)

The sales were made in proceedings ancillary to these suits for allotments under 25 U.S.C. § 345, in order to provide cash with which to pay allowances made for the fees and expenses of the attorneys who have represented the successful claimants to the Arenas allotments throughout this long litigation. (Arenas vs. Preston, et al., F. 2d (9th Cir. Feb. 23, 1956); id. 181 F. 2d 62, 68 (9th [71] Cir. 1950); see: Arenas vs. United States, 137 F. 2d 199 (9th Cir. 1943), rev'd, 322 U.S. 419 (1944); id. on remand, 60 F. Supp. 411 (S.D. Cal., 1945), aff'd in part and rev'd in part, 158 F. 2d 730 (9th Cir., 1946), cert. denied, 331 U.S. 842 (1947).)

Following the death of Guadalupe, Lee Arenas, as surviving husband, received one-half, and Eleuteria as surviving daughter received one-half, of Guadalupe's allotment. (25 U.S.C. § 372; Arenas vs. United States, 197 F. 2d 418 (9th Cir., 1952).)

Upon the death of Eleuteria in 1954, her surviving son, Richard Brown Arenas, was declared pur-

suant to 25 U.S.C. § 372 to have inherited his mother's interest in Guadalupe's allotment.

The State's claim for inheritance taxes is based upon the succession of Lee Arenas as surviving husband of Guadalupe, and Richard as surviving son of Eleuteria, to the allotted lands.

Lee and Richard have filed an ancillary petition in each of these suits, seeking a declaration that no inheritance tax lien exists against the remaining proceeds from the allotted land sales.

The lands so sold were subject to trust patents issued under 25 U.S.C. § 348, which provides that "patents shall be of the legal effect, and declare that the United [72] States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period."

In Arenas vs. Preston, et al., supra, Judge Stephens observed for the Court that: "The interest of the United States in the allotment will not cease to exist until the 'trust patent' to the prop-

erty is ripened into an unqualified patent * * *" (181 F. 2d at 67.)

And it has recently been held that the proceeds from the sales are held by the United States subject to the same trust as the lands prior to sale. (United States vs. Preston, et al., supra, F. 2d (Feb. 23, 1956); see: Buchanan vs. Alexander, 45 U.S. (4 How.) 19 (1846); cf. F.H.A. vs. Burr, 309 U.S. 242 (1940).)

The United States "does not assert or claim any lien against the funds * * * by reason of any Federal Estate taxes * * *" (Cf. Landman vs. Commissioner, 123 F. 2d 787 [73] (10th Cir. 1941), cert. denied, 315 U.S. 810 (1942).)

The state inheritance taxes here claimed are in the nature of an excise imposed upon the privilege of succeeding to property by inheritance under the law of California. Stebbins vs. Riley, 268 U.S. 137, 140 (1925); Campbell vs. California, 200 U.S. 87 (1906); Magoun vs. Ill. Tr. & Sav. Bank, 170 U.S. 283, 288 (1898); cf: United States Trust Co. vs. Helvering, 307 U.S. 57, 60 (1939); Knowlton vs. Moore, 178 U.S. 41, 47 (1900); Scholey vs. Rew, 90 U.S. (23 Wall.) 331, 346 (1874).)

The Act of Congress which provides for allotment of the Mission Indian lands in trust specifies that the trust shall be for the "use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where

such land is located * * *" (24 Stat. 389 (1887), 25 U.S.C. § 348.)

Thus the Federal statute in effect incorporates by reference the California law as to intestate succession; and so the State law is adopted as Federal law. (Cf. Uravic vs. Jarka Co., 282 U.S. 234, 240 (1931).)

Hence the inheritance of allotted Mission Indian lands held under a trust patent devolves in accordance with, but not under, California law. And intestate succession results under and by force of Act of Congress. (See: 25 U.S.C. § 348, 371- [74] 379.)

Accordingly, the right of petitioners to succeed to Guadalupe's allotment is not dependent upon the law of California, but upon Federal law. This right of succession is the privilege here sought to be taxed.

And as explained in Mager vs. Grima, 49 U.S. (8 How.) 490 (1850), "if a State may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy." (49 U.S. at 494.)

But only "the authority which confers it may impose conditions upon it." (Magoun vs. Ill. Tr. & Sav. Bank, supra, 170 U.S. at 288; cf. Chanler vs. Kelsey, 205 U.S. 466, 479-482 (1907) (dissenting opinion, Holmes, J.).)

Here "the lands really passed under a law of the United States," and not by California's permission. [Childers v. Beaver, 270 U.S. 555, 559 (1926).]

Until recently it could be stated as a general proposition that Indian lands held under trust patents such as those involved here, are immune from all manner of taxation, in view of the undertaking "that at the expiration of said (trust) period the United States will convey the same by patent to said Indian, or his heirs * * * in fee, discharged of said trust and free of all charge or incumbrance whatsoever * * *" (25 U.S.C. § 348; Board of Comm'rs. vs. Seber, 318 U.S. 705, 716-717 (1943); Heckman vs. United States, 224 U.S. 413 (1912); [75] United States vs. Rickert, 188 U.S. 432 (1903); The New York Indians, 72 U.S. (5 Wall.) 761 (1866); The Kansas Indians, 72 U.S. (5 Wall.) 737 (1866).)

In Oklahoma Tax Comm'n vs. United States, 319 U.S. 598 (1943), upon considering the validity of Oklahoma's imposition of "inheritance taxes * * * upon the transfer of the estates of three deceased members of the Five Civilized Tribes" involving in part "restricted cash and securities held for the Indians by the Secretary of the Interior" (id. at 599, 600), the Supreme Court held that "the transfer of those lands which Congress has exempted from direct taxation by the State are also exempted from estate taxes" (id. at 611), but concluded "upon an examination of both the cases * * * and the statute which imposes the restriction (47 Stat. 777 (1933)), that the restriction, without more,

is not the equivalent of a Congressional grant of estate tax immunity." (319 U.S. at 601-602.)

Although the Supreme Court makes no mention of it, the scholarly dissent of Circuit Judge Murrah in Oklahoma Tax Commission rests largely upon the contention that the property in question devolved not only in accordance with, but also under and by force of Oklahoma law. (United States vs. Oklahoma Tax Commission, 131 F. 2d 635, 638-640 (10th Cir. 1942), rev'd id. supra, 319 U.S. 598.) [76]

As Judge Murrah expressed it: "(The law of Oklahoma is not merely a guide or criterion, but it creates the right and provides the means and manner of disposition." (Id. 131 F. 2d at 639; see: Jefferson vs. Fink, 247 U.S. 288, 290 (1918); In Re Pryor's Estate, 199 Okla. 17, 181 P. 2d 979, 982, cert. denied, 332 U.S. 816 (1947); cf. Blundell vs. Wallace, 267 U.S. 373 (1925).)

West vs. Oklahoma Tax Commission, 334 U.S. 717 (1948), affirming Yarbrough vs. Oklahoma Tax Commission, 200 Okla. 402, 193 P. 2d 1017 (1947), involved "the power of the State of Oklahoma to levy an inheritance tax on the estate of a restricted Osage Indian." (Id. at 718.)

Apparently accepting the view of the Oklahoma court that the property there in question devolved not only in accordance with, but also under and by force of Oklahoma law (id. at 722; see 34 Stat. 539 (1906)), the Supreme Court held that Oklahoma had the power to levy an inheritance tax, declaring

that "until Congress has in some affirmative way indicated * * * that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission case permits that liability to be imposed. But that case also makes clear that should any of the properties transferred be exempted by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes." (334 U.S. at 727-728.) [77]

Interesting to note at this juncture is the fact that Congress has provided that the Federal statute (25 U.S.C. 348), under which the allotment at bar devolved upon Lee Arenas and Richard, "shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickawaws, Seminoles (the Five Civilized Tribes), and Osage * * * in Oklahoma * * *" 25 U.S.C. § 339; see: Jefferson vs. Fink, supra, 247 U.S. at 290; Stephens vs. Cherokee Nation, 174 U.S. 445, 447 (1899).)

This fact lends support to the view that West, supra, 334 U.S. 717, and Oklahoma Tax Commission, supra, 319 U.S. 598, are to be distinguished from the cases at bar upon the ground that in those cases devolution was by force of Oklahoma law, where as here intestate succession occurred by force of Federal statute, 25 U.S.C. § 348.

It is unnecessary, however, to distinguish these decisions, since the cases at bar clearly fall within the above-quoted exception stated in the West opinion. For subsequent to the decision in West,

upon enacting legislation ceding limited State jurisdiction over civil and criminal actions involving the Indians of California, Congress expressly declared that: "Nothing * * * (herein) shall authorize the alienation, encumberance, or taxation of any real or personal property * * * belonging to any Indian * * * that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States * * *" [78] (67 Stat. 588, 589 (1953), 28 U.S.C. § 1360(b), 18 U.S.C. § 1162(b); cf. Van Brocklin vs. Tennessee, 117 U.S. 151 (1886).)

Furthermore, § 6 of the General Allotment Act (25 U.S.C. § 349) provides that: "At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; * * * Provided, that the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent * * * at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed * * * And provided further, that the provisions of sections * * * 348 to 350, inclusive, * * * shall not extend to any Indians in the former Indian Territory." (24 Stat. 390 (1887); 34 Stat. 182 (1906): see Monson vs. Simonson, 231 U.S. 341, 345-346 (1913).)

It follows then that the funds at bar are not subject to California's claim of lien for inheritance taxes.

The State also presents a motion to establish a lien for "personal income taxes for the years 1947, 1948 and 1949," [79] allegedly due from Lee Arenas under California's Personal Income Tax Law. (Cal. Rev. & T. Code § 18,882.) There is no showing as to the source of the income sought to be taxed.

Assuming arguendo that the income taxes in question are validly laid, the trust funds here are for reasons already stated immune from the claim of lien. (Squire vs. Capoeman, 350 U.S. (4/23/56); cf: Helvering vs. Producers Corp., 303 U.S. 376 (1938); Superintendent vs. Commissioner, 295 U.S. 418 (1935); Choteau vs. Burnet, 283 U.S. 691 (1931).)

The motion of the State of California filed March 5, 1956, must be denied, as must the prayer of the State's answer to the petition.

Since the petition also involves other claims, it will be restored to the calendar for further hearing. April 27, 1956.

[Endorsed]: Filed April 27, 1956. [80]

United States District Court, Southern District of California, Central Division

No. 1321-WM Civil

LEE ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 6221-WM Civil

ELEUTERIA BROWN ARENAS,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER DETERMINING THAT TRUST FUNDS ON DEPOSIT IN THE REGISTRY OF THE COURT ARE IMMUNE FROM CALIFORNIA STATE INCOME AND INHERITANCE TAX

The issues which are hereafter determined were raised by the following pleadings:

Case No. 1321-WM Civil

(1) The verified petition of Lee Arenas and Richard Brown Arenas in which they prayed, inter

alia, for determination of the taxes, if any, which are a lien upon funds remaining on deposit in the registry of this court in Case No. 1321-WM Civil and an Order to Show Cause directed to the United States of America and to the State of California that each appear before this court and show cause why this court should not: [81]

(a) Determine that the United States of America has no tax obligation or lien against either of the petitioners and that the funds on deposit in the registry of the court are not subject to any lien in its favor, and

(b) That this court determine that the State of California has no tax obligation or lien against either of the petitioners and that the funds on deposit in the registry of the court are not subject to any lien in its favor.

(2) The reply, and amended and supplemental reply, of the United States of America in which it conceded that it has no right of lien for estate taxes of other taxes against the petitioners or the funds on deposit in the registry of the court and joined with the petitioners in asserting that such funds (as restricted Indian trust funds) are immune, by federal law, from California State inheritance taxes;

(3) The answer, and amended answer, of the State of California, by and through Robert C. Kirkwood, as State Controller, in which it is alleged and asserted that such funds in the registry

of the court are subject to inheritance tax liens, in amounts not yet fixed and determined, arising from the successive deaths of Guadalupe Arenas, who was the wife of Lee Arenas and the adoptive grandmother of Richard Brown Arenas, and of Eleuteria Brown Arenas, who was the mother of Richard Brown Arenas, and further alleging that such inheritance taxes became and were liens upon such funds under certain laws of the State of California;

(4) A stipulation as to certain facts executed between the contesting parties;

(5) A motion, upon notice, by the State of California, by and through the Franchise Tax Board thereof, for an order granting a lien upon said funds to secure and enforce payment of an income tax obligation of petitioner Lee Arenas alleged to have arisen under certain laws of the State of California; [82]

(6) Oppositions to said motion by the United States of America and Lee Arenas.

Case No. 6221-WM Civil

(1) The verified petition of Richard Brown Arenas praying, inter alia, for determination of the taxes, if any, which are a lien upon funds remaining on deposit in the registry of this court in Case No. 6221-WM Civil and an Order to Show Cause directed to the United States of America and to the State of California that each appear before this court and show cause why this court should not:

(a) Determine that the United States of America has no tax obligation or lien against said petitioner and that the funds on deposit in the registry of the court are not subject to any lien in its favor, and

(b) That this court determine that the State of California has no tax obligation or lien against said petitioner and that the funds on deposit in the registry of the court are not subject to any lien in its favor.

(2) The reply, and amended and supplemental reply, of the United States of America in which it conceded that it has no right of lien for estate taxes or other taxes against said petitioner, or the funds on deposit in the registry of the court and joined with the petitioner in asserting that such funds (as restricted Indian trust funds) are immune, by federal law, from California State inheritance taxes;

(3) The answer, and amended answer, of the State of California, by and through Robert C. Kirkwood, as State Controller in which it is alleged and asserted that such funds are subject to an inheritance tax lien, in an amount not as yet fixed and determined, arising from the death of Eleuteria Brown Arenas, the mother of said petitioner, and under said laws of the State of California; [83]

(4) A stipulation as to certain facts executed between the contesting parties;

Irl Davis Brett appeared as counsel of record for the petitioners in both cases, Laughlin E. Waters,

United States Attorney, and Richard A. Lavine, Assistant United States Attorney, appeared as attorneys for the United States of America, James W. Hickey, Walter H. Miller and Vincent J. McMahon appeared as counsel for Robert C. Kirkwood, Controller of the State of California, and Edmund G. Brown, State Attorney General, and James C. Maupin, Deputy Attorney General, appeared for the People of the State of California and its Franchise Tax Board.

Whereupon, the cause having been briefed, argued and submitted to the court for consideration and decision, the Court finds, concludes the law to be, and makes and enters its order thereon as follows:

## Findings of Fact

(1) The funds on deposit in the registry of the court in each of these cases and upon which taxes are sought to be levied and liens therefor imposed and enforced are the remnants of larger funds derived from sales, with the consent of the United States pursuant to Title 25 U.S.C., Section 392, of portions of the lands within the Palm Springs Indian Reservation of the Agua Caliente Band of Mission Indians which in Case No. 1321-WM Civil were previously allotted to petitioner Lee Arenas and to the heirs of Guadalupe, meantime deceased, pursuant to Section 4 of the Mission Indian Act (26 Stat. 712) and which in Case 6221-WM Civil were previously allotted to Eleuteria Brown Arenas,

meantime deceased, pursuant to the same federal statute.

(2) The sales from which said funds were derived were made in proceedings ancillary to these suits for allotments under Title 25 U.S.C., Section 345, in order to provide cash with which to pay allowances made for the fees and expenses of certain attorneys [84] who originally represented Lee Arenas and Eleuteria Brown Arenas as successful claimants to such allotments in these cases.

(3) Following the death of Guadalupe on March 26, 1937, Lee, as surviving husband, received one-half and Eleuteria, as surviving daughter, received one-half of Guadalupe's allotment.

(4) Following the death of Eleuteria on April 26, 1954, petitioner Richard Brown Arenas was declared, pursuant to Title 25, U.S.C., Section 372, to have inherited his mother's allotment together with his mother's interest in Guadalupe's allotment.

(5) The State of California claims inheritance taxes against the funds on deposit in the registry of the Court in Case 1321-WM Civil as against Lee Arenas by virtue of his succession as surviving husband of Guadalupe and further claims inheritance taxes upon the funds on deposit in the registry of the court in both actions as against Richard Brown Arenas as the surviving son of Eleuteria Brown Arenas and adoptive grandson of Guadalupe.

(6) The lands which were sold, and from which the funds on deposit were derived, were subject to

trust patents issued by the United States of America pursuant to Section 4 of the Mission Indian Act (26 Stat. 12) and Title 25 U.S.C., Section 348, and the sales were made under stipulations approved by the United States and orders by this court approving the same which provided that such proceeds were held subject to the same trust as the lands were subject to prior to the sales and that any valid liens then existing and imposed upon the lands which were authorized to be and were sold were transferred to and imposed upon said funds.

(7) The claim of the State of California through its Franchise Tax Board in Case 1321-WM Civil is based upon an alleged claim for unpaid income taxes of petitioner Lee Arenas in the sum of $269.24, plus allegedly accruing interest, pursuant to Section 18,882 of the California Revenue and Taxation Code by the terms of which, if applicable and enforceable, the State of California is [85] placed in the position of a "money judgment creditor" of petitioner Lee Arenas.

(8) In addition to and except as hereinbefore expressly found, the Court finds that the allegations contained in paragraphs I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XIV, XV, XVI, XVII, XVIII and XIX of the joint petition of Lee Arenas and Richard Brown Arenas in Case 1321-WM Civil are true.

(9) In addition to and except as hereinbefore expressly found, the Court finds that the allegations

contained in paragraphs I, II, III, V, VI and VII of the petition of Richard Brown Arenas in Case 6221-WM Civil are true.

(10) That, except as otherwise and heretofore found in these findings of fact, the allegations contained in the answer and amended answer of respondent Robert C. Kirkwood as Controller of the State of California, are untrue.

## Conclusions of Law

And from the foregoing facts, the Court concludes:

(1) That the funds now on deposit in the registry of the court in cases 1321-WM Civil and 6221-WM Civil are immune and are not subject to California's claim of lien for inheritance taxes as against Lee Arenas or as against Richard Brown Arenas.

(2) That such funds in the registry of the court in Case 1321-WM Civil are not subject to and are immune from the claim of lien by the State of California as against Lee Arenas for personal income taxes.

## Order and Decree

Wherefore, by reason of the findings of fact and the conclusions of law heretofore found and made, It Is Ordered, Adjudged and Decreed that:

(1) The remaining funds now on deposit in the registry [86] of the court in Case 1321-WM Civil and Case 6221-WM Civil are not subject to a lien

in favor of the State of California as against Lee Arenas or as against Richard Brown Arenas for California State inheritance taxes and are wholly immune from such taxes;

(2) That the funds now on deposit in the registry of this court in Case 1321-WM Civil are not subject to a lien in favor of the State of California and against Lee Arenas for personal income taxes and are wholly immune therefrom;

(3) That the prayer of the State of California, as set forth in its answer and amended answer in each of said cases for the determination, fixing and enforcement of an inheritance tax upon such funds in said causes and as against Lee Arenas and Richard Brown Arenas be and the same are hereby denied and disallowed.

(4) That the motion of the State of California for the affixing of a lien upon the funds in the registry of the court in Case 1321-WM Civil as against Lee Arenas for enforcement of his alleged liability for unpaid income taxes of the State of California be and the same is hereby denied.

Dated: May 28, 1956.

/s/ WM. C. MATHES,
United States District Judge.

Presented by:

/s/ IRL DAVIS BRETT,
Attorney for Petitioners.

Approved as to form under Rule 7.

LAUGHLIN E. WATERS,
United States Attorney;

By /s/ RICHARD A. LAVINE,
Assistant U. S. Attorney; Attorneys for United States of America. [87]

Approved as to form under Rule 7.

By /s/ VINCENT J. McMAHON,
Attorney for Robert C. Kirkwood, Controller of the State of California.

Affidavit of service by mail attached.

Lodged: May 23, 1956.

[Endorsed]: Filed May 29, 1956.

Docketed and entered May 31, 1956. [88]

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[Title of District Court and Cause.]

Nos. 1321-WM and 6221-WM

## NOTICE OF ENTRY OF JUDGMENT

You are hereby notified that Order determining that funds on deposit in Registry this Court are immune from California State income and inheritance taxes has been docketed and entered this day in the above-entitled case.

Dated: Los Angeles, California, May 31, 1956.

CLERK, U. S. DISTRICT COURT,

By C. A. SIMMONS, Deputy Clerk. [90]

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[Title of District Court and Cause.]

No. 1321-WM Civil

## NOTICE OF APPEAL

You are hereby notified that Robert C. Kirkwood, Controller of the State of California, Claimant herein, hereby appeals from that certain order of this Court docketed and entered herein on May 31, 1956.

Dated: July 27, 1956.

ROBERT C. KIRKWOOD,
Controller of the State of California;

By /s/ WALTER H. MILLER,
Chief Asst. Inheritance Tax Attorney;

By /s/ VINCENT J. McMAHON,
Assistant Inheritance Tax Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 27, 1956. [92]

[Title of District Court and Cause.]

No. 6221-WM Civil

## NOTICE OF APPEAL

You are hereby notified that Robert C. Kirkwood, Controller of the State of California, Claimant herein, hereby appeals from that certain order of this court docketed and entered herein on May 31, 1956.

Dated: July 27, 1956.

ROBERT C. KIRKWOOD,
Controller of the State of California;

By /s/ WALTER H. MILLER,
Chief Asst. Inheritance Tax Attorney,

By /s/ VINCENT J. McMAHON,
Assistant Inheritance Tax Attorney.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 27, 1956. [95]

[Title of District Court and Cause.]

No. 1321-WM Civil

## STATEMENT OF POINTS ON APPEAL

Robert C. Kirkwood, Controller of the State of California, makes the following statement of points upon which he intends to rely on appeal:

1. The district court erred in determining that certain funds on deposit in the registry of said court, derived from the sale of certain lands included in a trust patent issued to the heirs of Guadalupe Arenas on February 24, 1949, are not subject to a lien in favor of the State of California for California State inheritance taxes as against Lee Arenas, Eleuteria Brown Arenas and Richard Brown Arenas.

2. The district court erred in determining that upon the death of Guadalupe Arenas on March 26, 1937, the transfer to her heirs Lee Arenas and Eleuteria Brown Arenas of certain lands held under a trust patent issued to Guadalupe Arenas on February 24, 1949, nunc pro tunc May 9, 1927, was not taxable for California State inheritance tax purposes.

/s/ JAMES W. HICKEY,
Chief Inheritance Tax Attorney;

/s/ WALTER H. MILLER,
Chief Assistant Inheritance Tax Attorney,

/s/ VINCENT J. McMAHON,
Assistant Inheritance Tax Attorney.

[Endorsed]: Filed August 3, 1956. [99]

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[Title of District Court and Cause.]

No. 6221-WM Civil

STATEMENT OF POINTS ON APPEAL

Robert C. Kirkwood, Controller of the State of California, makes the following statement of points upon which he intends to rely on appeal:

1. The district court erred in determining that certain funds on deposit in the registry of said court, derived from the sale of certain lands included in a trust patent issued to the heirs of Guadalupe Arenas on February 24, 1949, are not subject to a lien in favor of the State of California for California State inheritance taxes as against Lee Arenas, Eleuteria Brown Arenas and Richard Brown Arenas.

2. The district court erred in determining that upon the death of Guadalupe Arenas on March 26, 1937, the transfer to her heirs Lee Arenas and Eleuteria Brown Arenas of certain lands held under a trust patent issued to Guadalupe Arenas on February 24, 1949, nunc pro tunc May 9, 1927, was not

taxable for California State inheritance tax purposes.

3. The district court erred in determining that certain funds on deposit in the registry of said court, derived from the sale of certain lands included in a trust patent issued to Eleuteria Brown Arenas are not subject to a lien in favor of the State of California for California State inheritance taxes as against Richard Brown Arenas. [105]

4. The district court erred in determining that upon the death of Eleuteria Brown Arenas on April 26, 1954, the transfer to her heir Richard Brown Arenas of certain lands held under a trust patent issued to Eleuteria Brown Arenas on February 24, 1949, and of certain lands held under a trust patent issued to Guadalupe Arenas on February 24, 1949, and inherited by Eleuteria Brown Arenas from the said Guadalupe Arenas was not taxable for California State inheritance tax purposes.

/s/ JAMES W. HICKEY,
Chief Inheritance Tax Attorney;

/s/ WALTER H. MILLER,
Chief Assistant Inheritance Tax Attorney,

/s/ VINCENT J. McMAHON,
Assistant Inheritance Tax Attorney.

[Endorsed]: Filed August 3, 1956. [106]

[Title of District Court and Cause.]

Case Nos. 1321-WM and 6221-WM

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 113, inclusive, contain the original

(In Case No. 1321-WM)

Order to Show Cause;
Petition for Allocation of Funds on Deposit in Registry of the Court;
Answer;
Reply to Petition for Determination of Taxes, etc.;
Amended Answer Stipulation Thereon, and Order Thereon;
Notice of Pendency of other Action;
Notice of Appeal;
Statement of Points on Appeal & Designation of Record on Appeal;
Counter-Designation of Contents of Record Upon Appeal.

(In Case No. 6221-WM)

Order to Show Cause;
Petition for Determination of Taxes, etc.;
Answer;
Reply to Petition for Determination of Taxes, etc.;

Amended Answer Stipulation Thereon, and Order Thereon;
Notice of Pendency of Other Action;
Notice of Appeal;
Statement of Points on Appeal & Designation of Record on Appeal;
Counter-Designation of Contents of Record on Appeal.

(In Both Cases)

Memorandum of Decision;
Findings of Fact, Conclusions of Law & Order;

which, together with a full, true and correct copy of the Notification the Order Determining that Funds on Deposit in Registry this Court are Immune from California State Income and Inheritance Taxes has been docketed and Entered on May 31, 1956, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that the foregoing record fee amounts to $2.00 and has been paid by appellant.

Witness my hand and seal of the said District Court this 27th day of August, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk.

By /s/ CHARLES E. JONES,
Deputy.

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Filed: August 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15243

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ROBERT C. KIRKWOOD, Controller of the State of California,

*Appellant,*

*vs.*

LEE ARENAS, RICHARD BROWN ARENAS and UNITED STATES OF AMERICA,

*Appellees.*

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**Appeals From the United States District Court for the Southern District of California, Central Division.**

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## APPELLANT'S BRIEF.

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**Appeals From the United States District Court for the Southern District of California, Central Division.**

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## APPELLANT'S BRIEF.

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### Statement of Pleadings and Facts Disclosing Jurisdiction.

*The issues herein are raised by the following pleadings:*

Case No. 1321-WM Civil.

(1) The verified petition of Lee Arenas and Richard Brown Arenas in which they prayed, *inter alia,* for determination of the taxes, if any, which are a lien upon funds remaining on deposit in the registry of this court in Case No. 1321—WM Civil and an Order to Show Cause directed to the United States of America and to

the State of California that each appear before this court and show cause why this court should not:

(a) Determine that the State of California has no tax obligation or lien against either of the petitioners and that the funds on deposit in the registry of the court are not subject to any lien in its favor.

(2) The answer, and amended answer, of the State of California, by and through Robert C. Kirkwood, as State Controller, in which it is alleged and asserted that such funds in the registry of the court are subject to inheritance tax liens, in amounts not yet fixed and determined, arising from the successive deaths of Guadalupe Arenas, who was the wife of Lee Arenas and the adoptive grandmother of Richard Brown Arenas, and of Eleuteria Brown Arenas, who was the mother of Richard Brown Arenas, and further alleging that such inheritance taxes became and were liens upon such funds under certain laws of the State of California.

Case No. 6221-WM Civil.

(1) The verified petition of Richard Brown Arenas praying, *inter alia,* for determination of the taxes, if any, which are a lien upon funds remaining on deposit in the registry of this court in Case No. 6221-WM Civil and an Order to Show Cause directed to the United States of America and to the State of California that each appear before this court and show cause why this court should not:

(a) Determine that the State of California has no tax obligation or lien against said petitioner and that the funds on deposit in the registry of the court are not subject to any lien in its favor.

(2) The answer, and amended answer, of the State of California, by and through Robert C. Kirkwood, as State Controller in which it is alleged and asserted that such funds are subject to an inheritance tax lien, in an amount not as yet fixed and determined, arising from the death of Eleuteria Brown Arenas, the mother of said petitioner, and under said laws of the State of California.

The facts of the case are as follows: On the 24th day of February, 1949, Guadalupe Rice Arenas received a trust allotment of certain lands. [*Tr. pp. 8, 87, 89, par. (8) thereof.] The said Guadalupe Rice Arenas (hereinafter referred to as Guadalupe Arenas for purposes of brevity) died intestate on March 26, 1937. [Tr. pp. 8, 88, 89, par. 8 thereof.] Upon her death her interest in said trust allotments passed one-half to her husband Lee Arenas and one-half to her daughter Eleuteria Brown Arenas (hereinafter referred to as Eleuteria Arenas for the purposes of brevity). [Tr. pp. 10, 11, 88, 89, par. 8.] Eleuteria Arenas received a trust allotment of certain lands on the 24th day of February, 1949. [Tr. pp. 27, 90, par. 9 thereof.] Eleuteria Brown died intestate on April 26, 1954, and upon her death her interest in the lands received by inheritance from her mother Guadalupe Arenas as well as the allotted lands received by her from the United States passed to her son Richard Brown Arenas (hereinafter referred to as Richard Arenas for the sake of brevity). [Tr. pp. 13, 29, 88, par. 4.] On April 6, 1951, a Judgment and Supplemental Decree was entered holding that the attorneys who represented the Indians in the litigation regarding the allotments were entitled to a lien on the trust allotments in payment of their fees. [Tr. pp. 9, 28, 88, 89, par. 8, 90, par. (9).]

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*Tr. refers to Transcript of Record.

Pursuant to this judgment certain portions of the trust allotment of Guadalupe Arenas and Eleuteria Brown were sold. [Tr. pp. 12, 16, 17, 18, 31, 32, 87, 88, 89, par. (8), 90, par. (9).] In order to consummate said sales it was necessary to obtain a release of inheritance tax lien from the State of California which was given by the State Controller on the condition that the lien, if any, would be transferred and affixed to the funds deposited in the registry of the court. [Tr. pp. 16, 34, 88, 89, par. (6) and (8), 90 par. (9).] Thereafter the petitioners herein Lee Arenas and Richard Brown Arenas filed Orders to Show Cause [Tr. pp. 3, 5] and Petitions for allocation of Funds and determination of taxes and liens thereof which existed against the funds on deposit in the registry of the court. [Tr. pp. 7, 27.] The Controller filed an Answer and Amended Answer contending that an inheritance tax was due by reason of the deaths of Guadalupe Arenas and Eleuteria Arenas and therefore a lien for such taxes existed against the funds on deposit in this registry of the court. [Tr. pp. 39, 42, 58, 64.] After hearing on the argument, the facts herein not being in dispute, Judge Mathes of the District Court determined that the assessment of a California inheritance tax was prohibited by certain congressional statutes and therefore no inheritance tax was due to the State of California by reason of the transfer upon death of the trust allotments in question. [Tr. pp. 72-82.] Thereafter Findings of Fact, Conclusion of Law and Order were made and Judgment entered on May 31, 1956 [Tr. pp. 83-92] denying the right of California to assess an inheritance tax on the transfer upon death of the said trust allotments. On July 27, 1956, the State Controller filed his Appeal. [Tr. pp. 93, 94.] The State Controller submitted his statement of points on Appeal. [Tr. pp. 95, 96.] Thereafter the certificate of the Clerk of the United States

District Court was filed herein on August 29, 1956. [Tr. pp. 98-100.]

The jurisdiction of the court herein rests on its jurisdiction to determine the interpretation to be given to the General Allotment Act (25 U. S. C., Secs 331-357, 24 Stats. 388); to the Mission Indian Act (26 Stats. 712, 39 Stats. 976); to the statutes granting limited civil and criminal jurisdiction to the State of California, namely, Section 1162 of 18 U. S. C. and Section 1360 of 28 U. S. C. enacted in 67 Statutes 588, 589; the enactment and repeal of Section 1 of 63 Stats. 705, Ch. 604.

The General Allotment Act (*supra*) generally provides the general law relating to trust allotments, their creation, duration, termination as well as all other pertinent provisions relating to allotments.

The Mission Indian Act (*supra*) provided for the relief of Mission Indians of California and in particular set forth the provisions relating to trust allotments for such Indians.

Section 1162 and Section 1360 (*supra*) are statutes defining civil and criminal court jurisdiction relating to California Indians.

Section 1 of 63 Stats. 705, Ch. 604 is a statute relating to civil and criminal court jurisdiction over the Agua Caliente Band of Mission Indians. It was enacted in 1950 and repealed in August 1953.

The pleadings as listed in the beginning of this statement of facts lists the pleadings which bring into issue the necessity for a court interpretation on the right of California to assess an inheritance tax on the trust allotments herein with a resulting lien for such taxes on said land and the proceeds of sale of such land.

## Statement of the Case.

The fundamental question in this case is whether on the death of a member of the Agua Caliente Band of Mission Indians of California, to wit, Guadalupe Rice Arenas and Eleuteria Brown Arenas, the transfer of their trust allotments to their heirs is subject to the California Inheritance Tax law. If such transfer is subject to the California Inheritance Tax law, then the question arises as to whether the lien for inheritance taxes, which attaches at the date of death pursuant to the California law, attaches to said trust allotments and the proceeds of the sale of certain of such trust allotments presently held in the registry of the United States District Court.

The funds in controversy are remnants of larger funds derived from sales, with the consent of the United States, of a portion of the lands within the Palm Springs Reservation of the Agua Caliente Band of Mission Indians previously allotted to Lee Arenas, Guadalupe Rice Arenas and Eleuteria Brown Arenas. The sales were made in proceedings ancillary to their suits for allotment in order to provide cash with which to pay the fees and expenses of the attorneys who represented the said Indians in establishing their rights to the allotments in question. Portions of the allotments belonging to Guadalupe Rice Arenas and Eleuteria Brown Arenas, which were transferred to their heirs upon death, were sold and as to the proceeds of those sales the State Controller contends that a lien for California inheritance taxes exists against such funds.

## Specification of Errors.

Robert C. Kirkwood, State Controller, makes the following specification of errors:

1. The District Court erred in determining that certain funds on deposit in the registry of said court, derived from the sale of certain lands included in a trust patent issued to the heirs of Guadalupe Arenas on February 24, 1949, are not subject to a lien in favor of the State of California for California State inheritance taxes as against Lee Arenas, Eleuteria Brown Arenas and Richard Brown Arenas.

2. The District Court erred in determining that upon the death of Guadalupe Arenas on March 26, 1937, the transfer to her heirs Lee Arenas and Eleuteria Brown Arenas of certain lands held under a trust patent issued to Guadalupe Arenas on February 24, 1949, *nunc pro tunc* May 9, 1927, was not taxable for California State inheritance tax purposes.

3. The District Court erred in determining that certain funds on deposit in the registry of said court, derived from the sale of certain lands included in a trust patent issued to Eleuteria Brown Arenas are not subject to a lien in favor of the State of California for California State inheritance taxes as against Richard Brown Arenas.

4. The District Court erred in determining that upon the death of Eleuteria Brown Arenas on April 26, 1954, the transfer to her heir Richard Brown Arenas of certain lands held under a trust patent issued to Eleuteria Brown Arenas on February 24, 1949, and of certain lands held under a trust patent issued to Guadalupe Arenas on February 24, 1949, and inherited by Eleuteria Brown Arenas from the said Guadalupe Arenas was not taxable for California State inheritance tax purposes.

5. The finding of fact in paragraph (4) thereof [Tr. p. 88] and paragraph (8) thereof [Tr. p. 89] that Richard Arenas, Lee Arenas and Eleuteria Arenas received their inheritance by virtue of Section 372, Title 25 U. S. C. is in error in that actually they received their rights of inheritance by virtue of Section 5 of the Mission Indian Act (26 Stats. 712).

6. The finding of fact in paragraph (6) thereof [Tr. p. 89] is in error in that the court found that the trust patents issued herein were issued pursuant to Section 348, 25 U. S. C. whereas in fact such trust patents were issued under Section 4 of the Mission Indian Act (26 Stat. 712).

7. The Conclusion of Law in paragraph (1) thereof [Tr. p. 90] that the funds on deposit in the registry of the court are immune and not subject to California's claim for inheritance taxes is in error since in fact such funds are subject to such a lien.

## Summary of Argument.

### I.

The transfer upon death of a trust allotment of a member of the Agua Caliente Band of Mission Indians to the heirs of said Indian is not excluded by Federal law from inheritance taxes imposed by the State of California.

a. The United States Supreme Court has affirmed that the transfer at death of property belonging to Indians held in trust by the United States is taxable for inheritance tax purposes by a state unless specifically prohibited by Congress.

b. Congress has not exempted from inheritance taxes the trust allotments awarded to members of the Agua Caliente Band of Mission Indians.

1. Section 6 of the General Allotment Act, which exempts from taxation trust allotments issued under the General Allotment Act, does not apply to the Agua Caliente Band of Mission Indians.
2. Section 5 of the Mission Indian Act of 1891 does not exempt the trust allotments of the Agua Caliente Band of Mission Indians from inheritance taxes imposed by the State of California.
3. Statutes ceding limited state jurisdiction over civil and criminal actions involving the Indians of California are not tax exemption statutes.
 i. Subsections (b) of Sections 1162 and 1360 are not affirmative legislation implementing tax exemption, but are merely negative limitations upon the scope of the affirmative part of said sections, to wit, subsections (a).
 ii. Even if it is conceded that subsections (b) of Sections 1162 and 1360 constitute affirmative legislation by Congress relating to taxation, still such sections do not cover inheritance taxes.
 c. The fact that the trust allotments pass at death by virtue of the laws of the United States does not preclude the right of California to assess an inheritance tax on said properties.

II.

The Inheritance Tax Law of the State of California includes within its scope the transfer upon death of the trust allotments herein.

III.

A lien for California inheritance taxes exists against the funds on deposit in the registry of the court.

Conclusion.

## ARGUMENT.

### I.

### The Transfer Upon Death of a Trust Allotment of a Member of the Agua Caliente Band of Mission Indians to the Heirs of Said Indian Is Not Excluded by Federal Law From Inheritance Taxes Imposed by the State of California.

#### (a) The United States Supreme Court Has Affirmed That the Transfer at Death of Property Belonging to Indians Held in Trust by the United States Is Taxable for Inheritance Tax Purposes by a State Unless Specifically Prohibited by Congress.

The right of a state to subject to an inheritance tax, property held in trust by the United States for an Indian, was decided by the United States Supreme Court in *West v. Oklahoma Tax Commission,* 334 U. S. 717, 68 S. Ct. 1223, 92 L. Ed. 1676. Its decision was based upon its prior decision in *Oklahoma Tax Commission v. United States,* 319 U. S. 598, 63 S. Ct. 1284, 87 L. Ed. 1612. Taken together these two cases clearly establish that a state may impose an inheritance tax upon the transfer at death of property held in trust by the United States for an Indian.

In *West v. Oklahoma Tax Commission,* 334 U. S. 717 at 727, 68 S. Ct. 1223, 92 L. Ed. 1676, it is stated:

> "An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. *United States Trust Co. v. Helvering,* 307 U. S. 57, 60; *Whitney v. Tax Commission,* 309 U. S. 530, 538. In this case, for example, the decedent had a vested interest in his Osage headright; and he

> had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title to the properties is in the United States or in the decedent and his heir is of no consequence to the taxability of the transfer."

The fact, therefore, that the allotments in this case are held in trust for the Indians by the United States does not in and of itself prohibit the imposition of inheritance taxes by the State of California on said trust allotments. The State of California may therefore impose such a tax. However, this right to impose a tax is not unlimited. The Supreme Court has clearly indicated that in those cases where Congress has intervened and granted an exemption that in those cases the State will be prohibited from assessing a tax. In *West v. Oklahoma Tax Commission,* 334 U. S. 717 at 727, 728, 68 S. Ct. 1223, 92 L. Ed. 1676, it is stated:

> "The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission case permits that liability to be imposed. But that case also makes clear that should any of the properties transferred be exempted

by Congress from direct taxation they cannot be included in the estate for inheritance tax purposes. No such properties are here involved, however."

The question to be determined therefore is whether Congress has in fact exempted from tax the trust allotments awarded to the members of the Agua Caliente Band of Mission Indians. If no such exemption has in fact been given, then California may assess an inheritance tax on these trust allotments.

**(b) Congress Has Not Exempted From Inheritance Taxes the Trust Allotments Awarded to Members of the Agua Caliente Band of Mission Indians.**

1. Section 6 of the General Allotment Act, Which Exempts From Taxation Trust Allotments Issued Under the General Allotment Act, Does Not Apply to the Agua Caliente Band of Mission Indians.

Section 6 of the General Allotment Act (25 U. S. C., Sec. 349), provides in brief as follows:

> "That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent . . ."

Judge Mathes in his memorandum of decision in the District Court [Tr. p. 81] based the exemption of these

trust allotments in part on Section 6 of the General Allotment. In addition in the recent case of *Squire v. Capoeman,* 351 U. S. 1 at 7, 8, 76 S. Ct. 611, 100 L. Ed. 477, the Supreme Court interpreted said Section 6, as exempting from Federal income taxes, a trust allotment awarded to a Quinaielt Indian of the State of Washington under the General Allotment Act. It would appear therefore that as to trust allotments issued under the General Allotment Act, Section 6 is effective to exempt such trust allotments from taxes.

It is the position of the State Controller, however, that the trust allotments awarded to the Mission Indians do not come within the provisions of the General Allotment Act (25 U. S. C., Secs. 331 to 357; 24 Stats. 388) but that in fact the allotments, made to the Indians in the instant case, are governed by the Mission Indian Act, 26 Stats. 712. Such being the case, Section 6 of the General Allotment Act would not be applicable in the present case and it would not serve to exempt from taxes the trust allotments awarded to the Mission Indians.

In this regard we refer to *St. Marie v. United States,* 108 F. 2d 876 at 880, 881. In that case the Mission Indians urged that they had acquired vested rights to trust allotments by reason of the General Allotment Act and therefore they insisted that the action of the Secretary of Interior in awarding the allotments was a mere ministerial act which should be completed. The court however rejected their argument and held that such vested rights accrue only where a specific statute has given the Indians a right of selection. It was further held that the Mission Indian Act did not give such right of selection and that the General Allotment Act which did give such

right of selection was not applicable to the Mission Indians. At 108 F. 2d 876 at 881 it is stated:

> "Finally it is urged that the Act of February 14, 1923, Ch. 76, 42 Stat. 1246, 25 U. S. C. A., §335, makes the General Allotment Act applicable to the Mission Indians . . .
>
> "We think this provision does not have the effect ascribed to it . . . It does not refer to or mention the Mission Indian Act, and is merely a part of the General Allotment Act."

Actually, although the Mission Indians did not come within the scope of the General Allotment Act, the Indian agent who assisted them in making their allotments certified that the allotments were made under the General Allotment Act. The court completely discounted this fact and adhered to its opinion that any allotments to be made for the Mission Indians had to be made under the Mission Indian Act and not the General Allotment Act. In this regard (*St. Marie v. United States,* 108 F. 2d 876 at 879) it was stated:

> "It is further asserted that the certificate of Wadsworth to the allotment schedules of 1927, indicates that the General Allotment Act is applicable. We do not believe that such a statement by a subordinate officer can be said to be indicative of congressional intent. It amounts to no more than an erroneous opinion . . ."

This opinion of the Circuit Court of Appeals that the General Allotment Act is not applicable to the Mission Indians has in effect been affirmed by the United States Supreme Court. In *Arenas v. United States,* 322 U. S. 419, 64 S. Ct. 1090, 88 L. Ed. 1363, the Supreme Court in its discussion of the applications of the Mission Indians

for trust allotments indicated that the pertinent law was the Mission Indian Act and not the General Allotment Act. All through its opinion in its discussion of the application of Lee Arenas the Court refers to the Mission Indian Act. The Supreme Court recognized the distinction between the General Allotment Act and the Mission Indian Act. It referred specifically to the General Allotment Act and then referred to the Mission Indian Act. As to the latter Act, the Court affirmed that such Act was enacted specifically for the Mission Indians. On page 420 of said opinion it said:

> "For a long period Congress pursued the policy of imposing as rapidly as possible, our system of individual land tenure on the Indians. To this end tribal or communal land holdings of the Indians were superseded by allotment to individuals, who were protected against improvidence by restraints on alienation. [General Allotment Act of 1887, 24 Stats. 388, 25 U. S. C. 331.] The Mission Indians had deserved well and fared badly and Congress passed the Mission Indian Act of 1891 for their particular redress."

There is no question therefore but that the Supreme Court in said case clearly recognized that the rights of the Mission Indians had their origin in the Mission Indian Act and not the General Allotment Act.

In approving the trust allotments herein for Lee Arenas and Guadalupe Arenas, the Circuit Court of Appeals in *United States v. Arenas,* 158 F. 2d 730, used as a guidepost the opinion of the United States Supreme Court in *Arenas v. United States,* 322 U. S. 419.

It is clearly established therefore that the trust allotments awarded to the members of the Agua Caliente

Band of Mission Indians were awarded under the Mission Indian Act and that the General Allotment Act is not applicable to such Mission Indians. As such it is evident that Section 6 of said General Allotment Act is not applicable to the Mission Indians. The tax exemption given under said Section 6 is therefore not available to the Mission Indians.

2. Section 5 of the Mission Indian Act of 1891 Does Not Exempt the Trust Allotments of the Agua Caliente Band of Mission Indians From Inheritance Taxes Imposed by the State of California.

The exemption from taxes provided by Section 6 of the General Allotment Act is therefore not available to the Mission Indians because they are not covered by said Act. However, the question arises as to whether Congress has provided a similar exemption from taxes in the Mission Indian Act. A close examination of said Act (26 Stats. 712 and 39 Stats. 976), clearly indicates that no similar exemption from taxes has been given to the Mission Indians under the Mission Indian Act. The only provision in the Mission Indian Act upon which an argument might be made that a tax exemption has been given to the Mission Indians is found in Section 5 thereof. That section provides as follows:

> "That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall

> have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the Indian, or his heirs as aforesaid, in fee, discharged of said trust and *free of all charge or incumbrance whatsoever* . . ." (Emphasis added.)

The pertinent portion of Section 5 is the provision that when the trust expires the United States agrees to convey the property to the Indian ". . . free of all charge or incumbrance whatsoever . . ." In *United States v. Rickert,* 188 U. S. 432, 23 S. Ct. 478, 47 L. Ed. 532, it was held that property held in trust for Indians was not subject to a property tax in the State of South Dakota on the basis of the Federal instrumentality theory. A provision similar to Section 5 of the Mission Indian Act was considered which provided that the allotment would at the termination of the trust pass "free of all charge or incumbrance whatsoever . . ." This provision was tied into the Federal instrumentality theory on the basis that if South Dakota assessed a real property tax against the trust allotments it would in effect burden the allotments. That since the Federal Government had agreed to convey the allotment free of any burdens, the Federal Government in effect would have to pay the tax. If it paid the tax, the effect was that the State of South Dakota in effect was taxing the United States Government which of course would be prohibited. On this basis therefore, to wit, the Federal instrumentality theory, the United States Supreme Court prohibited the application of the South Dakota real property tax. The consideration by the court of the statutory provision "free of all charge or incumbrance whatsoever . . ." was merely as part

and parcel of the Federal instrumentality theory and in no sense whatsoever did the court hold or attempt to hold that such language in a statute was of itself a tax exemption statute.

The basis therefore of the *Rickert* case was the Federal instrumentality theory. The Oklahoma Tax Commission cases recognized this fact and on this basis overruled the *Rickert* case. In *West v. Oklahoma Tax Commission,* 334 U. S. 717 at 726, 68 S. Ct. 1223, 92 L. Ed. 1676, it is stated:

> ". . . Moreover express repudiation was made of the concept that these restricted properties were Federal instrumentalities and therefore constitutionally exempt from estate tax consequences . . . The very foundation upon which the Rickert case rested was thus held to be inapplicable."

The rejection of the Federal instrumentality theory impliedly also rejected the former theory that such trust property could not be incumbered by taxes or other charges. This specific point is discussed in the *Oklahoma Tax Commission* cases and the United States Supreme Court held therein that such burdens will not prevent the imposition of an inheritance tax. In *West v. Oklahoma Tax Commission,* 334 U. S. 717 at 727, it was said:

> "The result of permitting the imposition of the inheritance tax on the transfer of trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax. And until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from inheritance tax liability, the Oklahoma Tax Commission case permits that liability to be imposed."

The rejection of the *Rickert* case therefore necessarily includes a rejection of the conclusion in the *Rickert* case that a provision such as was contained in Section 5, to wit, "free of all charge or incumbrance whatsoever . . ." prevents the assessment of inheritance taxes and a lien therefor as constituting a burden or charge within the meaning of said Section 5. This is further evidenced by the distinction drawn by the Oklahoma Tax Commission between the nature of the property tax which was the tax at issue in the *Rickert* case and an inheritance tax which was the tax involved in the *Rickert* cases. In *West v. Oklahoma Tax Commission,* 334 U. S. 727 at 727 it was said in this regard:

> "Implicit in this Court's refusal to apply the Rickert doctrine to an estate or inheritance tax situation is a recognition that such a tax rests upon a basis different from that underlying a property tax. An inheritance or estate tax is not levied on the property of which an estate is composed. Rather it is imposed upon the shifting of economic benefits and the privilege of transmitting or receiving such benefits. *United States Trust Co. v. Helvering,* 307 U. S. 57, 60; *Whitney v. Tax Commission,* 309 U. S. 530, 538. In this case, for example, the decedent had a vested interest in his Osage headright; and he had the right to receive the annual income from the trust properties and to receive all the properties at the end of the trust period. At his death, these interests and rights passed to his heir. It is the transfer of these incidents, rather than the trust properties themselves, that is the subject of the inheritance tax in question. In this setting, refinements of title are immaterial. Whether legal title

> to the properties is in the United States or in the decedent and his heir is no consequence to the taxability of the transfer."

It is to be concluded therefore from an examination of the *Rickert* case and the *Oklahoma Tax Commission* case that the phrase "free of all charge or incumbrance whatsoever . . ." is not in and of itself a tax exemption statute, and furthermore that such a phrase or a statute while it may permit the assessment of a property tax (which is now questionable in view of the *Oklahoma Tax Commission* cases) it will not prevent the assessment of an inheritance tax which is not a tax on the property but is a tax on the transfer of the economic benefits relating to said property.

This apparently was also the opinion of Judge Mathes in the District Court. In his decision, 140 Fed. Supp. 606 at 608, he stated:

> "Until recently it could be stated as a general proposition that Indian lands held under trust patents, such as those involved here, are immune from all manner of taxation, in view of the undertaking. That at the expiration of said [trust] period the United States will convey the same by patent to said Indian, or his heirs . . . in fee, discharged of said trust and free of all charge or incumbrance whatsoever. . . ."

The Controller submits therefore that the phrase "free of all charge or incumbrance whatsoever . . ." as set forth in Section 5 of the Mission Indian Act, 26 Stats. 712, does not exempt the trust allotments involved herein from the assessment of an inheritance tax by the State of California.

## 3. Statutes Ceding Limited State Jurisdiction Over Civil and Criminal Actions Involving the Indians of California Are Not Tax Exemption Statutes.

### *i. Subsections (b) of Sections 1162 and 1360 Are Not Affirmative Legislation Implementing Tax Exemption, but Are Merely Negative Limitations Upon the Scope of the Affirmative Part of Said Sections, to Wit, Subsections (a).*

In August, 1953, Congress granted limited criminal and civil jurisdiction over the Indians in California by enacting 67 Statutes 588, 589 (18 U. S. C., Sec. 1162, 28 U. S. C., Sec. 1360). Section 1162 of 18 U. S. C. provides as far as is pertinent to the present case:

> "(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the state to the same extent that such state has jurisdiction over offenses committed elsewhere within the state, and the criminal laws of such state shall have the same force and effect within such Indian country as they have elsewhere within the state:
>
> | State of | Indian country affected |
> | --- | --- |
> | California | all Indian country within the state. |
>
> "(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian, or any Indian tribe, band, or community that is held in trust by the United States, or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner in-

> consistent with any Federal treaty, agreement, or statute, or with any regulation made pursuant thereto, or shall deprive any Indian, or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing, or regulation thereof."

The question is whether this section and its companion section relating to civil jurisdiction, to wit, Section 1360 of 28 U. S. C. (see appendix, p. 1), are tax exemption statutes. It is the contention of the United States that said sections are tax exemption statutes, and Judge Mathes in his memorandum of decision so held. [Tr. pp. 80-81.]

It is the position of the State Controller that said sections are not tax exemption statutes, but are no more nor less than what they purport to be, namely, statutes conferring limited criminal and civil jurisdiction for court actions on the respective states.

The language relied upon as granting the tax exemption is as set forth in subsection (b) of each section. A careful reading of that subsection reveals that it is in the negative. It states:

> "Nothing in this section shall authorize the alienation, encumbrance or taxation. . . ."

It refers to the authority given in subsection (a), which is the affirmative part of the statute. It specifically provides that subsection (a) of said sections does not authorize "alienation, encumbrance, or taxation." It would be absurd to say, therefore, in view of the language of subsection (b), that subsection (a) gives California the

right to tax. The point is that, except for subsection (b), an argument might have been made that subsection (a) would include such authority, but, so that there would be no doubt on the question, subsection (b) was added and it specifically provides that subsection (a) does not include such authority.

But, if subsections (a) of Sections 1162 and 1360 do not give California the right to tax, do subsections (a) of said sections prohibit California from taxing? The answer must be no. As mentioned above, the all-inclusive language of subsections (a) might have been seized upon as an authority to tax, and Congress wished to make it plain that it was not considering alienation, encumbrance, or taxation. If anything, subsections (a) would infer authority on the part of California to tax. It is clear, therefore, that subsections (a) do not prohibit California from taxing.

If California is prohibited from taxing by the sections in question, it is only by virtue of subsections (b). A careful reading of said subsections (b) indicate that the function of said subsections is to define the scope of subsections (a). Their effect is negative. They specify what subsections (a) do not cover. In no sense whatever is there any positive statement which indicates that subsections (b) are affirmative enactments existing independent of subsections (a).

Further evidence that subsections (b) are not affirmative enactments is evidenced from a consideration of their subject matter. To allege that they are tax exemption statutes is to allege that subsections (b) are intended also as statutes that prohibit alienation, and prohibit encumbrancing. For Congress has used the three words in conjunction, and, if subsections (b) are tax exemption

statutes, then they also are alienation statutes and encumbrancing statutes. The Controller submits that such an assumption is unwarranted by virtue of the clear language of the statute. In addition, it will be noted that said sections relate to the Indians in California, Minnesota, Nebraska, Oregon, and Wisconsin. When it is considered that in each state there are many different tribes of Indians, with different rights flowing from different treaties, statutes, and other agreements, it is clear that Congress would not have intended to affect all provisions of alienation, encumbrancing, and taxation of all such Indians by a subordinate clause in a statute dealing with a completely different topic, namely, court jurisdiction.

The Controller submits, therefore, that subsections (b) of said sections must be restricted to their proper function, namely, defining the scope of subsections (a), and they should not be construed to be positive enactments. Their net effect is to maintain the *status quo* as to alienation, encumbrance, and taxation. If such alienation, encumbrance, or tax exemption is to be allowed, it must be by virtue of other Congressional enactments.

ii. *Even if It Is Conceded That Subsections (b) of Sections 1162 and 1360 Constitute Affirmative Legislation by Congress Relating to Taxation, Still Such Sections Do Not Cover Inheritance Taxes.*

Assuming that the contention of the United States is correct, that is, that Sections 1162 and 1360 are tax exemption statutes, the Controller nevertheless submits that such sections do not cover inheritance taxes. At the time Sections 1162 and 1360 were enacted (67 Stats. 588, approved August 13, 1953), Section 5 of the same

statute repealed Section 1 of the Act of October 5, 1949 (63 Stats. 705, ch. 604). The statute, which was repealed, read as follows:

> "That on and after January 1, 1950, all lands located on the Agua Caliente Indian Reservation in the State of California, and the Indian residents thereof, shall be subject to the laws, civil and criminal, of the State of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance, or *taxation of the lands of the reservation, or rights of inheritance thereof* tribally or individually owned, so long as the title to such lands is held in trust by the United States, unless such alienation, encumbrance, or taxation is specifically authorized by the Congress." (Emphasis added.)

If Sections 1162 and 1360 are tax exemption statutes, then their coverage with respect to the Agua Caliente Band of Mission Indians must be considered in connection with Section 1 of 63 Statutes 705. That section specifically mentioned the alienation, encumbrance, or taxation, not only of the lands but also of the rights of inheritance thereof. That section was then expressly repealed and superseded by Sections 1162 and 1360. The important point is that Sections 1162 and 1360 do not contain the phraseology ". . . rights of inheritance thereof." Where such is the case, it is the rule of statutory construction that Congress intended to exclude from the successor statute the subject previously mentioned and now excluded. (*Steward v. Kahn,* 78 U. S. 493, 11 Wall. 493, 20 L. Ed. 171; *Zientek v. Reading Co.,* 93 Fed. Supp. 875.) Such being the case, it would follow that, even if it conceded that Sections 1162 and 1360 are tax exemption statutes, the failure of those sections to refer

to the taxation of the rights of inheritance must be construed as a clear expression of Congressional intent to omit such subject from the successor statutes.

In either event, therefore, Sections 1162 and 1360 cannot be said to have granted an exemption from inheritance taxes to the Agua Caliente Band of Mission Indians. If subsections (b) are held to be negative limitations upon the affirmative portion of Sections 1162 and 1360, then Sections 1162 and 1360 are not tax exemption statutes. On the other hand, if Sections 1162 and 1360 are held to be tax exemption statutes, then the repeal of Section 1 of the Act of October 5, 1949 (63 Stats. 705, Ch. 604), reveals a clear Congressional intent to exclude from the scope of Sections 1162 and 1360 the taxation of the rights of inheritance of the Agua Caliente Band of Mission Indians.

In addition, the effect of the repeal of Section 1 of the Act of October 5, 1949 (63 Stats. 705, ch. 604), has its effect not only on Section 6 of the General Allotment Act but also on Section 5 of the Mission Indian Act which have been discussed above. Neither of those statutes nor any statutes have specifically mentioned the taxation of the rights of inheritance. Where such a specific mention has been made and has been repealed, it is clear that the effect of such enactment and repeal of Section 1 of 63 Statutes 705 takes precedence over all of the other statutes.

It is the conclusion of the State Controller, therefore, that Congress has not prohibited the State of California from assessing an inheritance tax in this case and therefore under the authority of the *Oklahoma Tax Commission* cases, California may assess an inheritance tax in this case.

**(c) The Fact That the Trust Allotments Pass at Death by Virtue of the Laws of the United States Does Not Preclude the Right of California to Assess an Inheritance Tax on Said Properties.**

Judge Mathes in his memorandum of decision in the trial court [Tr. p. 77] held that the trust allotments herein passed by virtue of the law of the United States. He therefore concluded that since the transfer of the property was not founded on the law of California, therefore California had no right to tax. He distinguished the *Oklahoma Tax Commission* cases on the ground that in those cases the trust allotments passed by virtue of the law of Oklahoma and therefore Oklahoma had a justification for its tax. On page 80 of the Transcript of Record, he said:

> "This fact lends support to the view that West, *supra,* 334 U. S. 717, and Oklahoma Tax Commission, *supra,* 319 U. S. 598, are to be distinguished from the cases at bar upon the ground that in those cases devolution was by force of Oklahoma law, where as here intestate succession occurred by force of Federal statute, 25 U. S. C. §348."

The Controller submits that there is essentially no difference between the authority which permits the passage of the trust property upon death in Oklahoma, and the authority which permits the passage of the trust property upon death in California. In both cases the trust property devolves in accordance with the state law but not by force of the state law. Passage of the property in both cases results under and by force of appropriate Acts of Congress.

In *West v. Oklahoma Tax Commission,* 334 U. S. 717 at 722, the United States Supreme Court points out the

Federal statutes which authorize the passage of trust property upon death in the State of Oklahoma. They are Section 6 of the Osage Allotment Act, 34 Stats. 539, and the amendatory statute enacted, to wit, 37 Stats. 86. At any time Congress may amend, alter or repeal these statutes. If it does, then the rights of the Indians would be changed accordingly. The effect is clear therefore, namely, that Congress has authorized the use of the Oklahoma law. Ultimately, however, the rights depend on and pass by force of the law of the United States. In all events, the property passes in accordance with the law of Oklahoma, but by virtue of the laws of the United States.

The same situation exists with respect to the trust property passing to the Mission Indians. It passes in accordance with 26 Stats. 712, 39 Stats. 976. At any time Congress may amend, alter or repeal these laws. The property passes in accordance with the laws of California, but by virtue of the law of the United States. Essentially there is no difference therefore between the passage of the trust property in Oklahoma and the passage of such trust property in California. Both ultimately pass by the laws of the United States. Such being the case, there is no logical distinction between the *Oklahoma Tax Commission* cases and the instant case. The *Oklahoma Tax Commission* cases consequently constitute authority for the principle that trust allotments passing by virtue of the law of the United States, nevertheless are taxable for inheritance tax purposes by the state where the Indian resided.

The issue of whether the property in the case of the Oklahoma Indians passed by virtue of the laws of Oklahoma or by virtue of the laws of the United States was

raised in the lower court in the *Oklahoma Tax Commission* case. In *United States v. Oklahoma Tax Commission,* 131 F. 2d 635, relying on *Childers v. Beaver,* 270 U. S. 555, 46 S. Ct. 387, 70 L. Ed. 730, the majority opinion therein held that the trust properties of the Oklahoma Indians passed by virtue of the laws of the United States and not by virtue of the laws of Oklahoma and consequently denied the right of Oklahoma to assess a tax. Judge Murrah contended in his dissenting opinion that actually the rights passed by virtue of the law of Oklahoma. This was the main issue in the lower court.

The Supreme Court in reversing the lower court did not in any way allude to this point. It stated that there were only two questions involved:

> ". . . The basic questions to be decided are whether, as a matter of state law, the state taxing statutes reach these estates, and whether Congress has taken from the State of Oklahoma the power to levy taxes upon the transfer of all or a part of property and funds of these deceased Indians."
>
> *Oklahoma Tax Commission v. United States,* 319 U. S. 598 at 600.

Whether the property passed by the laws of the United States or by the laws of Oklahoma was evidently considered a question of such little significance that the Supreme Court did not deem a discussion of it necessary. The only possible conclusion is that regardless of whether the property passed by the laws of the United States or by the laws of Oklahoma, the result was the same, namely, Oklahoma could assess the inheritance tax.

And this principle is in keeping with the fundamental principles of tax jurisdiction. The Mission Indians, as

the Oklahoma Indians, are residents of their respective states. There is no question but that as to properties not restricted or held in trust, they can dispose of them by will or the laws of intestate succession in their own states and be subject to an inheritance tax on such property. The only issue in the present case is whether the State of California can assess an inheritance tax on the trust allotments. If Guadalupe Arenas or Eleuteria Arenas had by their own industry accumulated non-trust property there is no question but that on their death it would pass through the probate courts of the State of California and be subject to an inheritance tax. In *Acosta v. County of San Diego,* 126 Cal. App. 2d 455, 272 P. 2d 92, it was held that a Mission Indian living on a reservation was nevertheless a resident of California and entitled to welfare assistance from the County of San Diego. The discussion by the court therein reveals the attitude of the State of California with respect to the Mission Indians. In brief, it is the conclusion of that case that they are in all respects citizens and residents of California and entitled to all the privileges and rights of other citizens. In *Acosta v. County of San Diego,* 126 Cal. App. 2d 455 at 463, it was said:

> "On the contrary, the state's jurisdiction extends to all matters which do not interfere with the control which the Federal Government has exercised over Indian affairs."

And at page 464 it was said:

> "Reservation Indians who purchase or possess unrestricted property outside the reservation enjoy no more advantageous tax status than their white fellow citizens."

The Mission Indians are therefore residents of the State of California and subject not only to the privileges of that citizenship but also to the obligations thereof.

As pointed out in *Miller Bros. Co. v. Maryland,* 347 U. S. 340, 74 S. Ct. 535, 98 L. Ed. 744, at 345, the basis of death taxation is sufficiently based on domicile.

In *Graves v. Schmidlapp,* 315 U. S. 657, 62 S. Ct. 870, 86 L. Ed. 1097, the right of the state of domicile to assess a tax was reaffirmed even though the property was subject to the control of another state and under the legal protection of that state. At page 661 of said case it was held:

> "In numerous other cases the jurisdiction to tax the use and enjoyment of interests in intangibles, regardless of the location of the paper evidences of them, has been thought to depend on no factor other than the domicile of the owner within the taxing state. And it has been held that they may be constitutionally taxed there even though in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose legal protection they enjoy."

The Controller submits therefore that the decisions in the Oklahoma Tax Commission cases permit a state to assess an inheritance tax even though the trust property passes by virtue of the laws of the United States, and further alleges that this jurisdiction is ultimately based on the fact that the decedents in question were at the time of their deaths residents of the State of Oklahoma. The same jurisdictional facts exist in the present case and therefore California has the right to assess an inheritance tax on the transfer of the trust allotments even though the trust allotments ultimately pass by virtue of the law of the United States.

II.

## The Inheritance Tax Law of the State of California Includes Within Its Scope the Transfer Upon Death of the Trust Allotments Herein.

Section 13601 of the Revenue and Taxation Code of the State of California provides as follows:

> "§13601. Transfer by will or succession: by residents. A transfer by will or the laws of succession of this State from a person who dies seized or possessed of the property transferred while a resident of this State is a transfer subject to this part."

There is no doubt but that the trust allotments herein passed in accordance with the laws of succession of the State of California. There is, however, apparently a difference of opinion as to the Federal law which made applicable the laws of succession of the State of California.

It is the opinion of the State Controller that the laws of California were made applicable by virtue of the provisions of Section 5 of the Mission Indian Act (26 Stats. 712, 713) which provides as far as is relevant:

> ". . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of California . . ."

Judge Mathes [Tr. p. 80] attributes it to 25 U. S. C., Sec. 348 which is part of the General Allotment Statute. It provides as far as is relevant:

> ". . . in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the law of the State or Territory where such land is located . . ."

In either event the effect is the same, that is, the laws of succession of the State of California are made applicable to the trust allotments in question. Such being the case, the trust allotments passed in accordance with the laws of succession of the State of California and consequently an inheritance tax is due by virtue of the provisions of Section 13601 of the Revenue and Taxation Code.

It is true that the argument might be made that the property passed by virtue of the laws of the United States and that therefore the provisions of Section 13601 would not be applicable. Such however is not the interpretation that is placed on the statute by the California Supreme Court. In *Estate of Simpson*, 43 Cal. 2d 594, 275 P. 2d 467, in considering the scope of the inheritance tax law it stated at page 597:

> "The inheritance tax is not a tax on the property itself, but is an excise imposed on the privilege of succeeding to property upon the death of the owner . . . It arises under a general law, . . . . dealing with a particular area of taxation. An exemption from the burden of such general statute must be clearly shown and will not be inferred from the doubtful import of statutory language . . ."

The intent of the law therefore is broad in coverage and consequently the Controller submits that Section 13601 includes within its scope the trust allotments which upon death of Guadalupe Arenas and Eleuteria Arenas passed to their heirs.

Even if it is contended that Section 13601 does not cover the transfer upon death of the trust allotments, in that they passed not by virtue of the laws of the State of California but by virtue of the laws of the United States, the Controller submits that the transfer would still come

within the provisions of the Inheritance Tax Law. In this respect he refers to Section 13648 of the Revenue and Taxation Code which provides:

> "It is hereby declared to be the intent and purpose of this part to tax every transfer made in lieu of or to avoid the passing of property by will or the laws of succession."

Transfer is defined in Section 13304 of said code as follows:

> " 'Transfer' includes the passage of any property, or any interest therein or income therefrom, in possession or enjoyment, present or future, in trust or otherwise."

Certainly the definition of transfer could not be broader and it clearly includes in its scope the passage of any interest in property and therefore would include the decedent's interest in a trust allotment. Section 13648 is all-inclusive and would include such a transfer of trust allotments in the event it were held that Section 13601 was not applicable.

In *Oklahoma Tax Commission v. United States,* 319 U. S. 598 at 600, 63 S. Ct. 1284, 87 L. Ed. 1612, the United States Superior Court considered the scope of the Oklahoma Inheritance Tax Statute and concluded that it was sufficiently broad in scope to cover the transfer upon death of the trust allotments. At page 600 it stated:

> "The two controlling statutes broadly provide for a tax upon all transfers made in contemplation of death or intended to take effect after death as well as transfers 'by will or the intestate laws of this state' ".

An examination of the Oklahoma Inheritance Tax Statute (Laws of 1935, Ch. 66, Art. 5 and its reenactment in 1939 Laws of 1939, Ch. 66, Art. 9, p. 420, Sec. 1) reveals that it is similar in scope to the California Inheritance Tax Law. (Stats. of 1935, Ch. 358, and as codified Secs. 13301-14901, incl.) In fact the California statute may be said to be broader in scope in view of the provisions of Section 13648 which is a catch-all statute not included in the Oklahoma Statute.

If therefore the United States Supreme Court considered the Oklahoma Statute sufficiently broad in coverage to tax the trust allotments herein, clearly the California statute equally covers the taxation of said trust allotments.

Nor is the fact that the decedents herein are Indians exclude them from the operations of the Inheritance Tax Law. A close examination of the entire Inheritance Tax Law reveals no distinction as to the race of the persons covered. Section 13305 defines decedent or transferor as follows:

> " 'Decedent' or 'transferor' means any person by or from whom a transfer is made, and includes any testator, intestate, grantor, bargainor, vendor, assignor, donor, joint tenant, or insured."

Section 13306 defines transferee:

> " 'Transferee' means any person to whom a transfer is made, and includes any legatee, devisee, heir, next of kin, grantee, donee, vendee, assignee, successor, survivor, or beneficiary."

The language is all-inclusive. Where such is the situation the cases have held that Indians are included within the scope of the pertinent statute. In this respect in *Oklahoma Tax Commission v. United States,* 319 U. S. 598 at 606, it was said:

> "This court has repeatedly said that tax exemptions are not granted by implication. *United States Trust Co. v. Helvering,* 307 U. S. 57, 60. It has applied that rule to taxing acts affecting Indians as to all others. As was said of an excise tax on tobacco produced by the Cherokee Indians in 1870, 'If the exemption had been intended it would doubtless have been expressed.' Cherokee Tobacco, 11 Wall. 616, 620. In holding the income tax applicable to Indians, the court said: 'The terms of the 1928 Revenue Act are very broad and nothing then indicates that the Indians are to be excepted . . .' "

And this is the interpretation that the California courts would give to such a statute. In *Acosta v. County of San Diego,* 126 Cal. App. 2d 455, 272 P. 2d 92, the Mission Indians were held entitled to receive welfare aid under a general statute. The decision is based on the premise that they come within the provisions of general California statutes and are not excluded from their coverage.

The Controller submits therefore that the transfer upon death of the trust allotments herein come within the scope of the California Inheritance Tax Law and consequently are taxable upon death by the State of California.

## III.

## A Lien for California Inheritance Taxes Exists Against the Funds on Deposit in the Registry of the Court.

The California Inheritance Tax Law provides for a lien for such taxes which attach as of the date of the decedent's death. In this respect reference is made to Section 14301 of the Revenue and Taxation Code of California which provides:

> "Every tax imposed by this part, together with any interest on the tax, is a lien upon the property included in the transfer on which the tax is imposed. Except as otherwise provided in this chapter, the lien remains until the tax and interest are paid in full."

Section 13401 provides as follows:

> "An inheritance tax is hereby imposed upon every transfer subject to this part."

Section 14102 provides as follows:

> "Every tax imposed by this part is due and payable at the date of the transferor's death."

The language of the three sections indicates that a lien exists for every tax imposed and further that the tax imposed is imposed as of the date of decedent's death. It follows therefore that the lien exists from the date of decedent's death. This is affirmed by *Chambers v. Gibson,* 178 Cal. 416, 173 Pac. 752. That case held that the lien attached as of the decedent's death. While the statute of limitation was held to have barred that particular proceeding, the Controller points out that a subsequent

amendment to the Inheritance Tax Law (Sec. 14674 appendix) eliminated the question of the Statute of Limitations and it was so held in *Riley v. Havens,* 193 Cal. 432, 225 Pac. 275. There is no doubt therefore that a lien for inheritance taxes existed from the date of the deaths of Guadalupe Arenas and Eleuteria Arenas.

In the Findings of Fact specifically paragraph (8) thereof [Tr. p. 89] and paragraph (9) [Tr. pp. 88, 89] it was found that the allegations contained in paragraph XVI [Tr. p. 16] and paragraph VII [Tr. p. 33] of the respective petitions of the parties were true. Said paragraph stated that the release of the California Inheritance Tax lien on the trust allotments was on condition that the proceeds of the sales made herein would be transferred and affixed to the funds deposited in the registry of the court. In addition paragraph (6) of the Findings of Fact [Tr. pp. 88, 89] affirms that the liens, if any, would attach to funds in the registry of the court.

There is no question therefore but that a lien for inheritance taxes attaches as of the date of a decedent's death to property subject to the California Inheritance Tax Law. If then the trust allotments herein are found to be subject to the California Inheritance Tax Law, it follows that a lien for inheritance tax attached at the date of death. By agreement among the parties the lien attached to the proceeds of the sales of the trust allotments and accordingly a lien exists on said proceeds presently held in the registry of the court.

Nor is such a lien barred by the fact that the property was held in trust by the United States. This question was raised in the *Oklahoma Tax Commission* cases and rejected by the United States Supreme Court. In *West v. Oklahoma Tax Commission,* 334 U. S. 717, at 727, it stated:

> "The result of permitting the imposition of the inheritance tax on the transfer of the trust properties may be, as we have noted, to deplete the trust corpus and to create lien difficulties. But those are normal and intended consequences of the inheritance tax and until Congress has in some affirmative way indicated that these burdens require that the transfer be immune from the inheritance tax liability, the Oklahoma Tax Commission case permits that liability to be imposed . . ."

The State Controller submits therefore that a lien exists against the funds presently held in the Registry of the District Court.

## Conclusion.

The State Controller submits therefore:

1. That the transfer of the trust allotments in question upon the death of Guadalupe Arenas and Eleuteria Arenas are not exempt by Federal law from inheritance taxes imposed by the State of California either by virtue of specific statutory prohibition or by reason of the lack of jurisdiction on the part of the State of California.

2. That the California Inheritance Tax Law includes within its scope the taxation of trust allotments held in trust by the United States for the Mission Indians.

3. That a lien for California inheritance taxes attached to said trust allotments as of the dates of death of Guadalupe Arenas and Eleuteria Arenas and that said lien continues in effect against the proceeds of sale of the trust allotments presently held in the Registry of the District Court.

Respectfully submitted,

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## APPENDIX.

Section 1360 State civil jurisdiction in actions to which Indians are parties. (28 U. S. C., §1360, 67 Stats. 588, 589.)

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

| State of | Indian Country affected |
|---|---|
| California | All Indian country within the state |

. . ."

(b) Nothing in this section shall authorize the alienation, encumbrance or taxation of any real or personal property, including water rights belonging to any Indian or any Indian tribe, band or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use or such property in a manner inconsistent with any Federal treaty, agreement or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right of possession of such property or any interest therein.

(c) Any tribal ordinance or action heretofore or hereafter adopted by an Indian tribe, band or community in

the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Section 14674 (Revenue and Taxation Code of California).

Time limitations inapplicable. The provisions of the Code of Civil Procedure relative to the time of commencing civil actions do not apply to any action or proceeding under this part to levy, appraise, assess, determine, or enforce the collection of any tax, interest, or penalty imposed by this part.

No. 15243.

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT C. KIRKWOOD, Controller of the State of California,

*Appellant,*

*vs.*

LEE ARENAS, RICHARD BROWN ARENAS and UNITED STATES OF AMERICA,

*Appellees.*

---

**Appeals From the United States District Court for the Southern District of California, Central Division.**

---

## BRIEF FOR APPELLEES LEE ARENAS AND RICHARD BROWN ARENAS.

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**Appeals From the United States District Court for the Southern District of California, Central Division.**

---

## BRIEF FOR APPELLEES LEE ARENAS AND RICHARD BROWN ARENAS.

---

### Opinion Below.

The District Court's opinion appears on pages 72-82 of the Transcript of Record [hereafter "R"] and is reported in 140 Fed. Supp. 606, *et seq.*

### Jurisdiction.

Jurisdiction was vested in the lower court by Title 25, U. S. C., Section 345; by Title 28, U. S. C., Section 1345, and as a part of its general equity jurisdiction thereunder to dispose of the whole controversy and to make necessary decrees for distribution of funds *in custodia legis* under its control. 30 C. J. S. Equity, Sec. 67, p. 414 (note 37)

and cases cited. *Cf. Arenas v. Preston, et al.* (C. A. 9, 1950), 181 F. 2d 62, 67. Also *Segundo v. United States* (C. A. 9, 1956), 235 F. 2d 885, 889.

## Counter Statement of the Case.

This is another ancillary phase of the long series of trials and appeals arising out of the allotting of portions of the trust patented tribal lands of the (Agua Caliente) Palm Springs Band of Mission Indians in severalty to three members thereof: Lee Arenas (hereinafter called Lee), his first wife, Guadalupe Arenas (hereinafter called Guadalupe) and their adopted daughter, Eleuteria Brown Arenas (hereinafter called Eleuteria). The proceedings here under review concern an order and decree of the lower court [R. 90-91] that certain funds in its registry in two companion cases (1321 WM Civil—Lee) and (6221 WM Civil—Richard Brown Arenas as sole heir of Eleuteria) were not subject to liens in favor of the State of California for inheritance taxes and that such funds in 1321 WM Civil were not subject to a lien in favor of said State for income taxes. The State did not appeal from the decree that it had no *income tax* lien, but, through its Controller, Kirkwood, has timely appealed from the decree that it had no *inheritance tax* lien.

While we agree with appellant that the *facts* were not in dispute (App. Br. 4) we believe that: a restatement of such facts (including matters of which this Court, and the lower court take judicial notice[1]) will clarify the issues presented and decided.

---

[1]*Cf. Greeson v. Imperial Irr. Dist.* (C. A. 9, 1932), 59 F. 2d 529, 531; *Verde River, etc. v. Salt River, etc.* (C. A. 9, 1938), 94 F. 2d 936, 941; *United States v. North Am. Oil, etc.* (C. A. 9), 264 Fed. 336.

On February 8, 1887, the Act of Congress, known as the General Allotment Act, was approved (24 Stat. 388, *et seq.*—codified as 25 U. S. C. 331, *et seq.*). This act contained express provisions for allotment of Indian Tribal lands *in severalty* to individual members of the tribe (Sec. 5; 25 U. S. C., Sec. 348) and specifically provided for issuance of *fee simple* patents *prior to the expiration of the trust period,* in the discretion of the Secretary of the Interior (Sec. 6; 25 U. S. C. Sec. 349). By its express terms its general provisions for the allotting procedure (Secs. 1, 2 and 3; 25 U. S. C. 331-334), for *trust patents in severalty* following allotting in severalty, for *fee simple patents in severalty* prior to or following expiration of the trust period and for administrative extension of the trust period without the consent of the trust patentee (Secs. 5-6; 25 U. S. C. 348-349) were inapplicable to "any Indians in the former Indian Territory" (Sec. 8; 25 U. S. C. 339).

Section 6 (25 U. S. C. 349) also provided that: when a fee simple patent was issued *"thereafter all restrictions as to* sale, encumbrance, or *taxation* of said land shall be removed * * *."

On January 12, 1891, the Mission Indian Act was approved (26 Stat. 712). This implemented the General Allotment Act by making certain special provisions for the Mission Indians of California. The Palm Springs Band was a part thereof and Lee, Guadalupe, Eleuteria (their adopted daughter) and Richard (her son) were each members of said Band.

This Mission Indian Act provided for the selection of a reservation site upon which this Band was to be settled (preamble and Sec. 2); the issuance of a trust patent to the Band to be held in trust by the United States for 25

years (Sec. 3); the issuance during such 25 year trust period of the *tribal trust patent* of trust patents *in severalty* to qualified members of the band (Sec. 4) and that *fee simple patents* should be issued to the trust patentees in severalty *at the expiration of* the 25 year trust period (Sec. 5). There were no provisions in the Mission Indian Act for issuance of *fee simple* patents *prior to the expiration of the trust period,* nor for administrative extension of such trust period, such as was provided for in Sections 5 and 6 of the General Allotment Act (25 U. S. C. 348, 349) and there were no procedural provisions as to how and by what means selections for allotment in severalty were to be accomplished, as was provided in Sections 2 and 3 of the General Allotment Act. (25 U. S. C., Secs. 332-333).

Pursuant to the Mission Indian Act, the lands from which the proceeds here under consideration were derived, and others adjacent to what is now the City of Palm Springs were selected and trust patented to the Palm Springs Band by President Grover Cleveland (App. pp. 1-3) on May 14, 1896; the Secretary of the Interior commenced allotment in severalty proceedings through a special allotting agent, Wadsworth, *Arenas v. U. S.,* 60 Fed. Supp. 411, 414, who was directed to allot *pursuant to the General Allotment Act* (*U. S. v. Arenas,* 158 F. 2d 730, 735), *i. e.,* Section 5; 25 U. S. C. 348. The Secretary disapproved two separate allotment schedules which Wadsworth prepared and submitted to him in 1923 and 1927, respectively, and in both of which Lee, Eleuteria and Guadalupe were listed as allottees.

Other allottees than the Arenas family (the Ste. Maries) commenced actions in the lower court under Title 25, U. S. C. Section 345, to enforce completion of their al-

lotments and the issuance to them of trust patents in severalty, but were denied such relief (*Ste. Marie et al. v. United States*, 24 Fed. Supp. 237); this lower court decision was affirmed by this Court, partially upon the ground that the provisions of Section 5 of the General Allotment Act (25 U. S. C. 348) was inapplicable (*Ste. Marie et al. v. United States*, 108 F. 2d 876, 880-881), a petition for certiorari was denied because filed too late. 311 U. S. 652.

In 1940 Lee Arenas commenced a new action to enforce his personal and inherited rights to allotments and trust patents in severalty. He, too, lost in the lower court through summary judgment (unreported) based upon the *Ste. Marie* judgment and on appeal to this court (137 F. 2d 199) but won reversal and remand in the Supreme Court (322 U. S. 419) following which his rights to allotment and his rights as heir of Guadalupe were adjudged and upheld *under the General Allotment Act* in the lower court (60 Fed. Supp. 411), affirmed on appeal in this Court (158 F. 2d 730) and certiorari was denied, 331 U. S. 842. Subsequently, trust patents were issued to Lee [R. 7-8, 89]; to the unnamed heirs and devisees of Guadalupe [R. 8, 89] and to Eleuteria [R. 27, 89-90].

In separate administrative proceedings under Section 1 of the Act of June 25, 1910 (36 Stat. 855; 25 U. S. C. 372) it was determined that Eleuteria was the adopted daughter of Lee and Guadalupe and, as such, entitled to one-half of Guadalupe's allotted lands [R. 10, 89] and a trust patent was issued vesting undivided one-half interests in Guadalupe's allotted lands in Lee and in Eleuteria [R. 10-11, 89]. Such action was confirmed by the lower court (*Arenas v. U. S.*, 95 Fed. Supp. 962)

and affirmed by this court (*Arenas v. U. S.,* 197 F. 2d 418). This is the *first succession of title through inheritance* from which appellant derives its claim for California inheritance taxes.[2]

Eleuteria died intestate on April 26, 1954 [R. 13, 89] and in subsequent administrative proceedings under 25 U. S. C. 372 her surviving son, Richard Brown Arenas, was adjudged her sole heir at law and entitled to inherit her inherited interest in Guadalupe's allotment and Eleuteria's own allotment [R. 13, 29, 89-90]. This is the *second succession of title through inheritance* from which appellant derives its claim for California inheritance taxes.

Following issuance of the trust patents and several appeals to this Court (181 F. 2d 62, 68, and 202 F. 2d 740) the attorneys who represented Lee and Eleuteria were adjudged to have charging liens for fixed amounts of fees and costs upon the lands trust patented to Lee and Eleuteria, including those inherited through Guadalupe [R. 8-9, 28, 89-90]; the lower court ordered them sold to satisfy such liens [R. 11-12, 31, 89-90] but appellee Indians were able to effect private sales of portions thereof, including some of the inherited lands, so as to satisfy such liens [R. 12-13, 31, 89-90] and some of the cash proceeds remained in the registry of the lower court when the proceedings here under review were commenced [R. 14-15, 32-33, 89-90].

---

[2]The facts here are unique. Guadalupe's rights to an allotment in severalty were found to have accrued during her lifetime in 1927 (158 F. 2d 730, 751) and the trust patent to her heirs was decreed and issued *nunc pro tunc* 1927, but it was not until 1947 (331 U. S. 842), *ten years* after her death (March 26, 1937 [R. 8, 89]) that it was finally adjudged that Lee could inherit through her, and it was not until 1952 (197 F. 2d 418) that it was finally adjudged that Eleuteria could inherit through her (*Cf.* 95 Fed. Supp. 962, 967-968).

In order to consummate such private sales it was necessary for appellees to supply the purchasers with title insurance policies and in order to obtain them it was necessary to obtain releases of all lien claims. This was accomplished by stipulation and order that the proceeds of the sales stand in place of the trust patented lands which were sold and that all liens to which such lands were subjected, if any, were transferred to and affixed upon such funds [R. 15-16, 32-33, 89-90].

Thereafter, by the petitions and orders to show cause in both cases appellees sought and obtained the decree which is here under review [R. 7, 27, 3, 5, 83].

## Summary of Argument.

1. The various Indian acts, whether special or general and whether or not portions of appropriation acts, in respect to the same or related subject matter, are to be read and applied *in pari materia,* as if they were *one* law.

2. These trust patented lands were and are immune from taxation until a fee patent is issued by virtue of Title 25, U. S. C., Secs. 349 and 354, and Title 28, U. S. C., Sec. 1360(b).

3. The funds, which are the immediate subject matter of this appeal, stand in the same immune status as the lands from which they were derived.

4. These "inheritances" were not transfers *under the succession laws of California,* nor were they the shifting of economic benefits, nor the transmission or receipt of benefits *derived through or subject to the control of California.* To the contrary, they were created by, transferred under and received solely by virtue of, Acts of Congress. Hence, California had no right to an inheritance tax or lien thereon.

## ARGUMENT.

### Preliminary Statement.

It is difficult to improve upon the exhaustive, documented memorandum of opinion which was prepared and filed by the trial court [R. 72-82; *Arenas v. U. S.,* 140 Fed. Supp. 606-610] which completely and decisively meets and disposes of every point raised in the argument in appellant's brief, excepting only the rule that these Indian acts are to be read and applied *in pari materia.* We, therefore, unhesitantly cite and rely upon each and every of the points made, cases cited and conclusions reached in said opinion as our preliminary answer to appellant's brief. We shall, however, add a brief discussion of the four points enumerated under our summary of argument, *supra.*

### I.

### The Various Indian Acts, Whether Special or General and Whether or Not Portions of Appropriation Acts, in Respect to the Same or Related Subject Matter, Are To Be Read and Applied in Pari Materia, as if They Are One Law.

On pages 12-17 of his opening brief, appellant asserts that the allotments through which Lee, Guadalupe and Eleuteria received their trust patents to portions of the tribal land in the Palm Springs Reservation were derived through the Mission Indian Act and not through the General Allotment Act and, building upon such premise and upon the further premise that Section 6 of the General Allotment Act (25 U. S. C., Sec. 349) is not applicable to these lands, concludes that Congress has not exempted these trust allotments from taxes. This issue becomes completely decisive of the contentions made and con-

clusions reached by appellant by reason of the fact that he has expressly conceded that:

> "The Supreme Court has clearly indicated that in those cases where Congress has intervened and granted an exemption * * * the State will be prohibited from assessing a tax * * *." (App. Br. 11), and
>
> "* * * in the recent case of Squire v. Capoeman, 351 U. S. 1, 7-8, the Supreme Court interpretated Section 6 (of the General Allotment Act) as exempting from Federal income taxes, a trust allotment awarded * * * under the General allotment Act. It would appear, therefore, that as to trust allotments issued under the General Allotment Act, Section 6 is effective to exempt such trust allotments from taxes." (App. Br. 13.)

In the first place appellant errs in his facts. For the allotments to the Arenas family were made under the General Allotment Act as amended by the Act of June 25, 1910 (36 Stat. 859). This has been judicially determined by both the Supreme Court and this Court in the companion cases which have passed upon, interpreted and enforced these Arenas Allotments, viz.:

> "In 1916, however, Secretary Lane called the neglect to the attention of Congress and asked that he be authorized to make allotments in quantities governed by the General Allotment Act of 1887 as amended by Section 17 of the Act of June 25, 1910 (36 Stat. 859) instead of those set out in the Mission Indian Act of 1891. Thereupon, Congress passed the act of March 2, 1917 (39 Stat. 976) by which it authorized and directed the Secretary to proceed under the act of 1910 * * *." *Arenas v. United States,* 322 U. S. 419, 422.

"* * * It is highly relevant to point out that Wadsworth was specifically instructed by the Commissioner of Indian Affairs, with the approval of the Assistant Secretary of the Interior, to make all the Mission Indian allotments 'under the provisions of the Act of Congress of February 8, 1887 (24 Stat. 388) as amended by the Act of June 25, 1910 (36 Stat. 855) and supplemented by the act of March 2, 1917 (39 Stat. 969-976).' And Wadsworth followed his instructions * * *."

*United States v. Arenas* (C. A. 9, 1947), 158 F. 2d 730, 735.

But, assuming *arguendo,* that both courts were in error, appellant must still fail for the reason that the provisions of the General Allotment Act and those of the Mission Indian Act and the numerous other Acts of Congress in relation to allotments in severalty (excepting where certain states or Indian Tribes or allotments are expressly excepted from the application thereof) are to be read and applied *in pari materia* and as if they were *one* law.

"The correct rule of interpretation is that if divers statutes relate to the same thing, they are all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts *in pari materia* are to be taken together as if they were one law * * *."

*United States v. Freeman,* 44 U. S. (3 How.) 556, 564.

"It is obvious, therefore, that in order to carry into execution the intention of the legal department of the Government these various laws on the same subject matter must be taken together and construed

with each other, and we should defeat instead of carrying into execution the will of the law making power if we selected one or two of the acts and founded our judgment upon the language they contain without comparing and considering them in association with other laws passed upon the same subject."

*Converse v. United States,* 62 U. S. (21 How.) 463, 467.

The Federal Supreme Court has directly applied this rule to special and general Indian laws involving the leasing of restricted Indian mineral lands. *British American Oil Co. v. Board of Equalization,* 299 U. S. 159, 166. The Court of Appeals for the Tenth Circuit has applied this rule in construing a *special* act affecting the leasing of allotments to the Quapaw Indians (Act of June 7, 1897; 30 Stats. 62, 72) and the provisions of a *general mineral leasing* act derived from an appropriation act (act of March 3, 1909; 35 Stat. 781, 783, codified as 25 U. S. C., Sec. 396); *Hallam v. Commerce Mining etc. Co.,* 49 F. 2d 103, 108. This court has applied this rule by holding that Section 5 of the General Allotment Act (25 U. S. C., Sec. 348) was applicable to these very allotments. *Arenas v. United States* (C. A. 9, 1952), 197 F. 2d 418, 422.

Furthermore, as pointed out by the late Justice Garrecht, who wrote the majority opinion in 158 F. 2d 730, *et seq.,* through which this court completely overruled its former opinion in *Ste. Marie v. United States,* 108 F. 2d 876, there are no provisions in the Mission Indian Act comparable to Sections 2 and 3 of the General Allotment Act

(25 U. S. C., Secs. 332 and 333) which prescribes how and by whom in behalf of the Indian and in behalf of the Government allotments in severalty are to be selected, made and issued and without which Sections 4 and 5 of the Mission Indian Act would be inoperative (*Cf.* 108 F. 2d 876, 888-889). We quote two paragraphs to illustrate:

> "Furthermore, there are no provisions in the Mission Indian Act for an allotting agent to make allotments or for any survey or classification of lands. This procedure is all supplied by the General Allotment Act and the various amendments thereof. With respect to those particulars there were no other statutes to guide the alloting agent in what he did." (P. 888.)

> "* * * It is well to keep in mind * * * that any method of allotment suggested in the Mission Indian Act is so wanting in substance or form that the allotting officer had to borrow method and procedure from the General Allotment Act." (P. 889.)

From which it follows that appellant's concept that the tax immunities contained in the various Acts of Congress which were discussed under point II next following are inapplicable to these funds and these trust patented lands because such acts are not a part of the Mission Indian Act is entirely without substance and that all of these acts must be read and applied *in pari materia.*[3]

---

[3]Furthermore, the General Allotment Act is made applicable to these lands because (1) the reservation was created by Act of Congress, *i. e., t*he Mission Indian Act *Cf.* 25 U. S. C., Section 331, and (2) some of the land was purchased for it by the U. S. (108 F. 2d 876, 888), *Cf.* 25 U. S. C. 335.

## II.

## These Trust Patented Lands Are Immune From All Taxation, Including State Inheritance Taxes.

Having demonstrated under point I that the General Allotment Act and other Indian Acts are applicable here (the California Mission Indians not being expressly excepted as were the Oklahoma Indians, 25 U. S. C., Secs. 339, 349, 353) three decisions of the Federal Supreme Court have established these principles:

(a) If any Indian property is exempted by Congress from direct taxations "they cannot be included in the estate for inheritance tax purposes." *Oklahoma Tax Commission v. United States* (1943), 319 U. S. 598, 611; *West v. Oklahoma Tax Commission* (1948), 334 U. S. 717, 727-728.

(b) The literal language of 25 U. S. C. 349 (Sec. 6 of General Allotment Act) evinces a congressional intent to subject an Indian Allotment to *all* taxes only *after* a *fee simple patent* is issued to an allottee. *Squire v. Capoeman* (1956), 351 U. S. 1, 7-8.

(c) While exemptions from taxation should be clearly expressed, doubtful expressions are to be resolved *in favor of* the Indian, and, if the language may be interpreted in more than one way, one of which would prejudice and the other would *not* prejudice the rights of the Indian, the latter interpretation must be given. *Squire v. Capoeman* (1956), 351 U. S. 1, 6-7.

(d) It is irrelevant whether the exempting statute was enacted before or after the taxing statute. *Squire v.*

*Capoeman* (1956), 351 U. S. 1, 7. Applying these principles here, it follows that these Arenas trust patented[4] lands were and are exempt from inheritance taxes by California.

Applying the same principles of interpretation *in favor of* and not to the detriment of the Indian, it is readily apparent that subsection (b) of 28 U. S. C., Section 1360 (67 Stat. 588, 589) must be construed as an *express exemption* of these (trust patented) restricted, allotted lands for *all* taxes. [R. 80-81; *Arenas v. U. S.,* 140 Fed. Supp. 606, 609-610]. As Judge Mathes points out, Title 25, Section 349, was in effect and the case of *West v. Oklahoma Tax Commission* (1948), 334 U. S. 717, 727-728, had been decided *before* this 1953 act was passed. Clearly Congress knew that in subdivision (a) of 28 U. S. C., Section 1360 (*Cf.* App. Br. Appen., p. 1) it was enacting a law which gave California broad civil jurisdiction and authority which would, unless excepted from the grant, include the rights to alien, encumber and tax, viz.:

> "(a) * * * those civil laws of such state[5] that are of general application to private persons[6] shall have the same force and effect within such Indian country as they have elsewhere in the State. * * *."

---

[4]A trust patent is in reality no more than an *allotment certificate. Squire v. Capoeman* (1956), 351 U. S. 1, 3—Footnote 5; *Monson v. Simonson* (1913), 231 U. S. 341, 345.

[5]All Indian country within California is included.

[6]California's Inheritance Tax Act is of general application to private persons and privately owned property. Revenue & Taxation Code, Sec. 13601; *Estate of Simpson* (1954), 43 Cal. 2d 594, 597, 275 F. 2d 467.

Congress also knew that it had established a pattern of nontaxability of Indian trust patented or allotted lands (25 U. S. C., Secs. 349, 354, 379, and Sec. 1 of the Act of October 5, 1949 (63 Stat. 705, Sec. 5)). Congress also knew that in the *Oklahoma Tax Commission* case, *supra,* the Federal Supreme Court had held, by implication [R. 79; 140 Fed. Supp. 606, 609] that if State laws and State administrative and judicial officers could fix and control succession by heirs, *such* State could tax and delimit the rights it *thus controlled* and Congress also knew that by 25 U. S. C., Sections 372 and 373, it had completely withdrawn such right to fix and control wills and succession from all State control (*Cf. Arenas v. United States* (C. A. 9, 1952), 197 F. 2d 418, 420-421, and cases cited).

Having such congressional knowledge in mind, it is the plain intent of subdivision (b) of 28 U. S. C., Section 1360, that trust patented Indian lands could not be aliened or encumbered except as *permitted by Congress;* that they could not be taxed *at all* and that the State could not *at all* control the "ownership, right of possession of or any interest in" such property. Without which right "in probate proceedings or otherwise" the State would have no basis upon which to claim or enforce payment of an "inheritance tax."

> "In other words, the (inheritance) tax is imposed and is sustainable upon the theory that a state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state. Neces-

sarily, then, and concededly a succession to property effected independently of the authority of a particular state is not taxable by that state and is not within the purview of our inheritance tax acts."

*Estate of Bowditch*[7] (1922), 189 Cal. 377, 379, 208 Pac. 282;

*Cf. Estate of Dillingham* (1925), 196 Cal. 525, 532, 238 Pac. 367.

It is submitted, therefore, that these Arenas allotments were and are not taxable for inheritance taxes, or at all, by California.

III.

**The Funds in the Registry Have the Same Immune Status as the Allotted Lands From the Sales of Which Such Funds Were Derived.**

Little time need be spent on this point for appellant is foreclosed here by its stipulation with appellees and the lower court's approval thereof and order pursuant thereto [R. 16, 34, 89, 90; App. Br. 4].

"* * * but the sale and the payment into court occurred under agreement of all parties with and under the stipulation that the money would be under the same restriction as the land * * *."

*United States v. Preston* (C. A. 9, 1956), 232 F. 2d 77, 80.

They were also immune by the provisions of 25 U. S. C., Section 410 (34 Stat. 327 c. 3504).

---

[7]We are aware that this case has been overruled, in so far as it holds that intangible personal property, not located in a State, is not taxable thereby for inheritance taxes (*Estate of Newton* (1950), 35 Cal. 2d 830, 221 P. 2d 952), but the principle quoted remains intact. *Cf.* our Point IV, *infra*.

IV.

## These Inheritances Were Not Transfers Under, nor Economic Benefits Derived Through or Controlled by California. To the Contrary, They Were Created by, Transferred Under and Received Solely by Virtue of Acts of Congress.

Such determination by the trial court [R. 76-78; 140 Fed. Supp. 606, 608-609] is so well documented and supported that it requires no further argument. Appellant's argument (App. Br. 32-34) misses the *fundamental basis* of the right *to tax succession:*

> "* * * if a state may deny the privilege altogether, it follows that when it grants it it may *annex to the grant* any conditions which it supposes to be required by its interests or policy" (emphasis supplied).
>
> *Mager v. Grima* (1850), 49 U. S. (8 How.) 490, 494;
>
> *Cf. Estate of Bowditch* (1922), 189 Cal. 377, 379, 208 Pac. 282.
>
> "But only 'the authority which confers it may impose conditions upon it.'" [R. 77; 140 Fed. Supp. 606, 608.]
>
> "Consequently the legislature has the power to take away both rights (of inheritance and of testamentary disposition) and to make the state the successor to all property upon the death of the owner. The *right and power to impose a succession tax rests upon this principle*" (emphasis added).
>
> *Estate of Bowditch, supra,* p. 379.

Simple questions and the necessary answers thereto solve our problem here. Could California, in any manner

deprive Lee or Richard Arenas of their inherited rights in these allotted lands? Of course not. Could California substitute itself in their place as successor to said lands? Of course not. Where, then, is the *control basis to sustain the right to tax?* Quoting *Bowditch,* again, the answer is:

> "Necessarily, then * * *, a succession effected entirely independently of the authority of (the) State is not taxable by that State and is not within the purview of (its) inheritance tax acts." 189 Cal. 377, 379, 208 Pac. 282.

As was stated by the Pennsylvania Supreme Court, under similar circumstances to those here present:

> "There was no transfer by will or by the intestate laws (of Pennsylvania) of these adjusted service bonds. They passed to the heirs of the decedents as the ultimate donees * * * of the National Government, not by virtue of the intestate laws of this commonwealth, but by reason of the terms of an Act of Congress; for which reason, it seems clear that no (inheritance) tax is due * * *."
>
> *Re Schmuckler's Estate* (1941) 341 Pa. 36, 17 A. 2d 876, 878.

Appellant seeks support from the *Oklahoma Tax Commission* cases (App. Br., pp. 10, 11, and throughout) but, as the California Supreme Court has said:

> "* * * the language used in any opinion is to be understood in the light of the facts and the issue then before the court * * *."
>
> *Eatwell v. Beck* (1953), 41 Cal. 2d 128, 136, 257 P. 2d 643.

And as Judge Mathes [R. 79; *Arenas v. U. S.*, 140 Fed. Supp. 606, 609) and Judge Murrah (*United States v. Oklahoma Tax Commission* (C. A. 10, 1942), 131 F. 2d 635, 639) both point out, Oklahoma law not only created the right but through *its courts* and *its administrative Officials* it could control such rights. Rights and privileges which are *expressly denied* to California (28 U. S. C. 1360(b)).

It is respectfully submitted that the judgment below should be affirmed with costs to appellees.

Irl Davis Brett,

*Attorney for Appellees, Lee Arenas and Richard Brown Arenas.*

## APPENDIX.

THE UNITED STATES OF AMERICA.

To all to whom these presents shall come, Greeting:

Whereas it is provided by an Act of Congress entitled "An Act for the relief of the Mission Indians in the State of California," approved January twelfth Anno Domino one thousand eight hundred and ninety one (26 Stat. 712) that "the Secretary of the Interior shall appoint three distinterested persons as Commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California upon reservations which shall be secured to them."

*"Section 2"* That it shall be the duty of said Commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include as far as practicable, the land and villages which have been in the actual occupation and possession of said Indians and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the Secretary of the Interior."

*"Section 3"* That the Commissioners upon the completion of their duties shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the Commissioner and approved by him in favor of each band or village of Indians occupying any such reservation, which patent shall be of the legal effect and declare that the United States does and will hold the land thus patented, subject to the provisions of Section 4 of this Act for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to

which it is issued, and that at the expiration of said period the United States will convey the same, or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charges or incumbrances whatsoever."

And Whereas, it appears by a letter dated October twenty six eighteen hundred and ninety-five from the Commissioner of Indian Affairs, and an Order dated October twenty eight, eighteen hundred and seventy five from the Secretary of the Interior, that a selection has been made by the Commissioners appointed and acting under said Act of Congress of January twelfth eighteen hundred and ninety one for the Agua Caliente Band or Village of Mission Indians covering sections twelve, fourteen, twenty-two, twenty-four, twenty six and thirty four of Township four south of range four east of the San Bernardino Meridian in the State of California, containing three thousand eight hundred and forty four acres and eighty hundredths of an acre.

*Now Know Ye:* that the United States of America in consideration of the premises and in accordance with the provisions of the third section of the said Act of Congress, approved January twelfth eighteen hundred and ninety one, hereby declares that it does and will hold the said tracts of land selected as aforesaid (subject to all the restrictions and conditions contained in the said Act of Congress of January 12, 1891) for the period of twenty five years in trust for the sole use and benefit of the said Agua Caliente Band or Village of Mission Indians, according to the laws of California, and at the expiration of said period the United States will convey the same, or the remaining portion not patented to individuals, by patent to said Agua Caliente Band or Village

of Mission Indians as aforesaid in fee simple discharged of said trust and free of all charge or incumbrance whatsoever—Provided that when patents are issued under the fifth Section of said Act of January twelfth eighteen hundred and ninety-one in favor of individual Indians for lands covered by this patent they will override (to the extent of the land covered thereby) this patent, and will separate the individual allotment from the lands left in common; and there is reserved from the lands hereby held in trust for said Agua Caliente Band or Village of Mission Indians, a right of way thereon, for ditches or canals constructed by the authority of the United States.

In Testimony Whereof, I, Grover Cleveland, President of the United States of America have caused these letters to be made Patent and the Seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington this fourteenth day of May in the Year of our Lord one thousand eight hundred and ninety six and of the Independence of the United States the one hundred and twentieth.

By the President, Grover Cleveland

By M. McKean, Secretary

L. Q. C. Lamar

Recorder of the General Land Office

Recorded Vol. 21—pp. 231 to 233 inclusive.

No. 15243

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

ROBERT C. KIRKWOOD, Controller of the State of California,

*Appellant,*

*vs.*

LEE ARENAS, RICHARD BROWN ARENAS and UNITED STATES OF AMERICA,

*Appellees.*

---

**Appeals From the United States District Court for the Southern District of California, Central Division.**

---

## APPELLANT'S REPLY BRIEF.

---


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*Appellees.*

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**Appeals From the United States District Court for the Southern District of California, Central Division.**

---

## APPELLANT'S REPLY BRIEF.

---

### Statement of the Case.

One of the basic issues in the present case is whether the trust allotments issued herein were issued under the authority of the Mission Indian Act (26 Stats. 712) or the General Allotment Act (24 Stats. 388). Consequently, certain statements by the Appellees in their Counter Statement of the Case are not properly included in the Counter Statement of the Case but properly belong to the argument.

The statements referred to are on page 3 wherein it is stated, "This implemented the General Allotment Act by making certain special provisions for the Mission Indians

of California." Whether the Mission Indian Act, as is inferred, merely formed a supplementary part of the General Allotment Act or whether it was an independent statute is one of the issues of the case, and the Controller submits that the statement mentioned above should properly be part of the Argument of the case and not be considered as statement of fact.

On page 5 of Appellee's brief it is further stated, ". . . his rights to allotment and his rights as heir of Guadalupe were adjudged and upheld under the General Allotment Act in the lower Court (60 Fed. Supp. 411), affirmed on appeal in this court (158 F. 2d 730) and certiorari was denied, 331 U. S. 842." Whether or not these rights were granted under the General Allotment Act is one of the main issues of the case, and consequently the Controller submits that such statement and like statements should not be considered statements of fact and are improperly included therein. The Controller submits that such issues are properly matters for the Argument of the Case.

## Summary of Argument.

I.

The Mission Indian Act is not to be construed *in pari materia* with the General Allotment Act.

II.

California has the jurisdiction to tax the transfer at death of the trust allotments of Guadalupe Arenas and Eleuteria Rice Arenas.

Conclusion.

## ARGUMENT.

### I.

### The Mission Indian Act Is Not to Be Construed in Pari Materia With the General Allotment Act.

Appellees in their reply brief attempt to first prove that the trust allotments herein were issued under the authority of the General Allotment Act (Appellees' Br. pp. 8-10) and, second, they attempt to show that the Mission Indian Act and the General Allotment Act are *in pari materia* to such extent that the tax exemption section of the General Allotment section is therefore applicable to the trust allotments herein (Appellees' Rep. Br. pp. 10-12).

The Controller submits that a careful reading of *Arenas v. United States,* 322 U. S. 419, clearly indicates that it was the opinion of the United States Supreme Court that the trust allotments for the Mission Indians were to be issued under the Mission Indian Act. In this respect the court stated, 322 U. S. 419 at 432: ". . . It appears that the sole reason for denying a patent is a departmental change of policy, by which the Secretary now disagrees with *the allotment policy prescribed for these Indians by the Acts of 1891 and 1917."* The Act of 1891 is the Mission Indian Act, 26 Stats. 712, and the Act of 1917 is 36 Stats. 859. The Act of 1917 amended the Mission Indian Act in two ways. First it changed the sizes of the individual allotments to be made and, second, it took away the Secretary of Interior's discretion and directed him to make the allotments. It did not make the Mission Indian Act part of the General Allotment Act. The only reference to the General Allotment Act was that

the size of allotments to be given under the Mission Indian Act were to be the same size as authorized under the General Allotment Act as amended in 1910. That these are the only effects of the Act of 1917 is clearly indicated by the cases. (*St. Marie v. United States,* 108 F. 2d 876 at 880; *Arenas v. United States,* 322 U. S. 419 at 425.)

To state that the Mission Indian Act and the General Allotment Act are to be construed *in pari materia* and construed as one law is to do violence to the intent of congress as evidenced by the individual provisions of each of the individual Acts. If they were to be construed *in pari materia,* why then was it necessary for Congress to adopt the Act of 1917 to change the sizes of the allotments to be awarded the Mission Indians? If the Acts were *in pari pateria,* then the areas governing allotments under the General Allotment Act would govern the allotments under the Mission Indian Act and the Amendment of 1917 would be superfluous. This argument may seem impertinent, for naturally if the Mission Indian Act of 1891 prescribed allotments different in area from the allotments authorized by the General Allotment Act of 1887, then the specific allotments as specified by the Mission Indian Act would apply to the Mission Indians. But that is exactly the point. The Mission Indian Act is a different statute from the General Allotment Act, and as to the Mission Indians the provisions of the Mission Indian Act apply. Therefore when Section 5 of the Mission Indian Act provides that at the end of the allotment period the patent will be conveyed to the individual Indian "free of all charge or incumbrance whatsoever" (Appellant's

Op. Br. pp. 16, 17) it means just that and it does not mean as set forth in Section 6 of the General Allotment Act ". . . and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed . . ." (Appellant's Op. Br. p. 12). If Congress wanted the latter language to apply to the Mission Indians it should have included such language in Section 5 of the Mission Indian Act. It saw fit to use the other language, and therefore as to the Mission Indians, the applicable section is Section 5 of the Mission Indian Act.

But let us assume that Congress saw fit to repeal the General Allotment Act of 1887 in 1920. Would then the right of Arenas be precluded so that he could not have succeeded in establishing his trust allotment as he eventually did? The Controller submits that he would not have been precluded. His right to the allotment accrued under the Mission Indian Act and as long as that Act continued in existence, his right to the allotment could have been established. The repeal of the General Allotment Act of 1887 would in no manner affect his right to an allotment. It is evident therefore that his right to an allotment was founded in the Mission Indian Act.

As pointed out however the repeal of Section 1 of the Act of October 5, 1949 (63 Stats. 705, Ch. 604) (Appellant's Op. Br. pp. 24-26) specifically relating to the taxation of the right of inheritance renders moot the interpretation of Section 5 of the Mission Indian Act and Section 6 of the General Allotment Act. Congress by repealing said statute has indicated an intention not to exclude such taxation from the taxing power of the State of California.

## II.

## California Has the Jurisdiction to Tax the Transfer at Death of the Trust Allotments of Guadalupe Arenas and Eleuteria Rice Arenas.

In the second and fourth parts of Appellees' Argument, Appellees essentially rest their case on the proposition that California lacks jurisdiction to tax the transfer at death of the trust allotments in question because the trust allotments pass at death by virtue of the laws of the United States. The Controller submits that in spite of this fact California has the right to tax such transfers and this right of California is well grounded in law. The fact that the individual property being considered for taxation passes by virtue of the law of another jurisdiction does not preclude the right of California to assess an inheritance tax where the decedent at the time of death was a resident of California.

In *Estate of Hodges,* 170 Cal. 492, 150 Pac. 344, the decedent died a resident of California. At the time of his death there were located in Massachusetts certain bonds and stocks of foreign corporations, deposits in banks and certain chattels. Said assets remained in Massachusetts and were subjected to ancillary administration in that state. Under that administration all such personal property was transferred to a testamentary trust, which trust remained under the jurisdiction of the Massachusetts courts. At no time did California obtain possession of the assets or at any time was the probate proceedings in California effective to pass the property in Massachusetts. The court held, however, that the transfer of such prop-

erty was subject to an inheritance tax by the State of California by reason of the fact that the decedent was a resident of California and by reason of the doctrine of *mobilia sequuntur personam.* Actually, however, the fact of the matter is that the property passed by virtue of the law of Massachusetts and yet California was acknowledged as having the right to tax the property. The California Supreme Court recognized the doctrine of *mobilia sequuntur personam* for what it actually is, a matter of comity between the states. Actually, although Massachusetts passed the property in accordance with the law of California it was actually passed by virtue of the law of Massachusetts. At 170 Cal. 492 at 499 this principle is clearly enunciated by the California Supreme Court:

> "It is of course true that while the general rule is that the right of succession to personal property is governed by the law of the domicile of the owner at the time of his death and not by the law of its locality, and the right of the state of such domicile under its laws to impose such inheritance tax is sustained for that reason, although the personal property may be actually in another state, *this general rule of succession is subject to the limitation that there be no rule to the contrary in the state where the personal property is actually located. But this limitation cannot apply here because there is no law to the contrary in the state of Massachusetts.* Under a stipulation of the parties in this proceeding it appears that by section 1, chapter 143, of the revised laws of Massachusetts of 1902, if administration is taken there on the estate of an inhabitant of any other state his estate found in Massachusetts must be, after payment of debts, disposed of according to his

> last will if he left any, 'otherwise . . . his personal property would be distributed and disposed of according to the laws of the state or country of which he may have been an inhabitant.' As then the law of Massachusetts recognizes the general rule that the disposition by will, or succession thereto on intestacy, as to personal property located in Massachusetts owned by a nonresident of that state, is entirely governed and controlled by the law of the domicile of the decedent, it must necessarily follow as to the particular personal property involved here that the general rule of the authorities applies; that an inheritance tax on personal property of a decedent though located out of the state of his domicile may be imposed on the right of disposition by will oı succession on intestacy which is granted under the law of the domicile of the decedent."

The exact same situation exists in the instant case. As in the *Hodges* case, the law of Massachusetts made the law of California applicable, so here in the instant case the law of the United States makes the law of California applicable. The *Hodges* case permitted the taxation of the assets passing by virtue of the law of Massachusetts, and so also it permits the taxation of the assets herein passing by virtue of the law of the United States.

## Conclusion.

In conclusion therefore let us consider the essential facts. The decedents in question were at death residents of California. The lands in question are located in California. The Oklahoma Tax Commission cases laid down the rule that such transfers are taxable for inheritance taxes unless there is a specific direction by Congress exempting

such properties from state taxation (Appellant's Op. Br. pp. 10-12). Appellees cannot deny that the transfers in the Oklahoma Tax Commission cases were by virtue of the laws of the United States for at any time the United States can repeal the Osage Allotment Act (Appellant's Op. Br. pp. 27, 28). The Supreme Court saw fit to approve the right of Olkahoma to tax the trust allotments of the Osage Indians even though they passed by virtue of the law of the United States, therefore the fact that the trust allotments of the Mission Indians pass by virtue of the laws of the United States does not preclude the right of California to tax such trust allotments. This decision of the United States Supreme Court is in keeping with the principles laid down by the California Supreme Court in *Estate of Hodges, supra.* The only question at issue therefore is whether Congress has specifically exempted the trust allotments in question from taxation by the State of California. The Controller submits that such exemption has not been given, therefore, the transfers are taxable by the State of California.

Respectfully submitted,

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Walter H. Miller,
*Chief Assistant Inheritance Tax Attorney,*

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*Assistant Inheritance Tax Attorney,*

*Attorneys for Appellant.*

No. 15243

# In the United States Court of Appeals for the Ninth Circuit

ROBERT C. KIRKWOOD, CONTROLLER OF THE STATE OF CALIFORNIA, APPELLANT

*v.*

LEE ARENAS, RICHARD BROWN ARENAS AND UNITED STATES OF AMERICA, APPELLEES

*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

## MEMORANDUM FOR THE UNITED STATES


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*Attorneys, Department of Justice,*
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# In the United States Court of Appeals for the Ninth Circuit

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No. 15243

Robert C. Kirkwood, Controller of the State of California, appellant

*v.*

Lee Arenas, Richard Brown Arenas and United States of America, appellees

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*APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION*

---

## MEMORANDUM FOR THE UNITED STATES

---

This case was initiated by appellees Lee Arenas and Richard Brown Arenas by the filing of a petition for a determination that the funds in question, the proceeds of sale of Indian trust allotments, were not subject to taxes under the laws of the State of California or the United States. The United States, after thorough examination of the matter, filed an amended answer in which it stated that the United States was not claiming a lien against the funds for federal estate or other taxes. The Government also took the position in the trial court that such funds are necessarily immune, by federal law, from California tax laws (Fdg. 2, R. 84).

The United States, after examination of the briefs filed by appellant and by appellees Arenas, is of the opinion that the issues and applicable law are well developed therein, and that further briefing by the Government would be generally cumulative. However, it is noted that appellant (Br. 12-20) pitches his case on the position that the tax exemption embodied in Section 6 of the General Allotment Act is not applicable to allotments made under the Mission Indian Act of 1891. While we endorse the argument of appellees Arenas (Br., pp. 13-16) as disposing of this contention, the Court's attention is directed also to the following provision of the Joint Resolution of June 19, 1902, 32 Stat. 744, which is equally dispositive of the matter:

> Insofar as not otherwise specially provided, all allotments in severalty to Indians, outside of the Indian Territory, shall be made in conformity to the provisions of the Act approved February eighth, eighteen hundred and eighty-seven, entitled "An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," and other general Acts amendatory thereof or supplemental thereto, and shall be subject to all the restrictions and carry all the privileges incident to allotments made under said Act and other general Acts amendatory thereof or supplemental thereto.

The Government, of course, adheres to the position taken below and, upon the exhaustive opinion of the trial court (R. 72-82) and the brief filed in this Court by appellees Arenas, submits that the conclusion of the

district court that the funds are immune from State taxation is correct, and that the judgment appealed from should be affirmed.

Respectfully submitted,

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FEBRUARY 1957

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No. 15244

# United States Court of Appeals

for the Ninth Circuit

JOHNSON LINE, a Corporation,

Appellant,

vs.

SHAUN MALONEY,

Appellee.

# Transcript of Record

Appeal from the United States District Court for the Western District of Washington, Northern Division.

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No. 15244

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for the Ninth Circuit

JOHNSON LINE, a Corporation,

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**Appeal from the United States District Court for the Western District of Washington, Northern Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-14-56

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In the United States District Court for the Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant,

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant, complains and alleges as follows, to wit:

I.

That at all times herein mentioned plaintiff was, and is now, a resident of Seattle, King County, Washington, said place being in and within the Territorial confines over which the above-entitled Court has jurisdiction.

II.

That at all times herein mentioned, the Johnson Line, a foreign corporation, is doing business, and has a place of business in Seattle, King County, Washington, and was the owner and operator of the steamship, Golden Gate, and at all times mentioned in this complaint, said vessel was employed as a merchant vessel in navigable waters, at Seattle, Washington.

III.

That prior to the 28th day of June, 1953, the defendant entered into a contract with the W. R. Grace Company, said Company agreeing to act, and acting at all times mentioned in this complaint, as an independent contractor, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said defendant vessel, Golden Gate, in the Port of Seattle, in the navigable waters of Puget Sound, at Seattle, Washington.

IV.

That as an independent contractor, the W. R. Grace Company, hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract, and the plaintiff, at all times herein mentioned, acted under the orders of the W. R. Grace Company, in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

V.

That plaintiff has elected to recover damages against a third person, other than his employer, to wit: Said defendant, and is entitled to sue here under Section 933 of Title 33, U. S. C. A., and amendments thereto, and plaintiff has notified the Commissioner of this District, administering the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A., 901 et seq., of said election.

VI.

That on or about the 28th day of June, 1953, at about the hour of 8:30 a.m., plaintiff was obliged in the course of his employment to descend to the tween deck of the No. 7 hatch of said vessel, the Golden Gate; that while plaintiff was so engaged, he was suddenly and violently precipitated to the surface of said tween deck, grievously injuring him, as more fully hereinafter set out.

VII.

That the proximate cause of plaintiff's injuries and damages was the unseaworthiness of said vessel with respect to said tween deck, the failure to provide plaintiff with a safe place in which to work, and the careless and negligent manner in which said tween deck was maintained in that its surface was littered with debris and with numerous loose grains of wheat which caused plaintiff to slip, fall and injure himself as aforesaid; that said defective and unsafe condition was the proximate cause of plaintiff's injuries and damages, and that said condition was known, or should have been known by the defendant, its agents, servants and employees, in the exercise of reasonable and ordinary care.

VIII.

That as a proximate result of the unseaworthiness of the vessel and the failure to provide plaintiff with a safe place in which to work, and of the negligence of the defendant, its agents, servants and employees, plaintiff sustained a severe nervous shock, great pain and suffering; that he sustained

severe and permanent injuries to his right wrist; that by reason of said injuries, he has been permanently disabled in the exercise of his occupation as a longshoreman; that plaintiff is obliged to incur expenses for medical care and treatment; that he has lost wages, and will continue to lose wages; that prior to the time of receiving said injuries, plaintiff was an able-bodied man of the age of 41 years, and free from said injuries and infirmaties set out; that by reason of the foregoing, plaintiff has been damaged in the sum of $75,000.00.

Wherefore, Plaintiff prays for judgment against the defendant in the sum of $75,000.00, together with his costs and disbursements herein to be taxed.

ZABEL & POTH,

By /s/ PHILIP J. POTH,
Attorneys for Plaintiff.

[Endorsed]: Filed April 2, 1954.

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[Title of District Court and Cause.]

## ANSWER

Comes Now the the defendant and for answer to the cause of action stated in plaintiff's complaint herein admits, denies and alleges as follows, to wit:

I.

Defendant admits the allegations contained in paragraphs I, II and III of plaintiff's complaint.

II.

Defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph IV of the compaint, and therefore denies the same.

III.

Defendant admits the allegations contained in paragraph V of the complaint.

IV.

Defendant denies the allegations contained in paragraphs VI, VII and VIII of the complaint.

First Affirmative Defense

For further answer and by way of First affirmative Defense to plaintiff's complaint defendant alleges as follows:

I.

That if the plaintiff sustained any injuries or damages by reason of the accident as alleged and set forth in the complaint, or at all, such injuries and damages were proximately caused and contributed to by the negligence of the plaintiff himself, in that he failed to exercise reasonable care, and use ordinary caution for his own safety while descending to and walking on the surface of the tween deck of the SS "Golden Gate."

Wherefore, having fully answered plaintiff's complaint, defendant prays that the said complaint be dismissed with prejudice and that the court discharge the defendant from all liability to the plain-

tiff herein award to the defendant its costs and attorney's fees against said plaintiff.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed April 12, 1954.

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[Title of District Court and Cause.]

## PLAINTIFF'S REPLY TO DEFENDANT'S ANSWER

On the morning of June 28, 1953, plaintiff, Shaun Maloney, was ordered, along with his co-employees, to uncover No. 7 hatch of the vessel Golden Gate at its weather deck level. The men were further ordered and directed to descend to the tween deck and there to discharge general cargo from the vessel. Defendant states that a considerable amount of the hatch was uncovered and that daylight was allowed to flow on to the deck below.

Plaintiff has never contended that poor or improper lighting was the cause of plaintiff's injuries. The existing, unsafe condition at the time of plaintiff's injuries was the accumulation of slippery wheat dust and kernels. This condition had been allowed to be maintained by the defendant's agents, servants and employees. From the weather deck it did not appear that there was anything exceptionally wrong on the tween deck level (p. 14, lines 15,

16). To all outward appearances the deck below at the tween deck level was apparently safe to plaintiff. From his observation point on the main deck he was looking directly down into the hatch from a distance of approximately 20 feet (p. 28, line 17). Wheat dust by its very nature being transparent, could hardly be deemed to be visible to the plaintiff from his perspective at the weather deck level.

Plaintiff had taken but a step or two away from the ladder at the time that he fell because of the slippery wheat dust and kernels. His back would necessarily have to be to the hold as he was descending the ladder and he could not possibly be aware of the existing condition. Plaintiff had no knowledge of any unsafe condition (p. 29, line 28). Plaintiff was the first man down * * * into the hatch after the hold was uncovered (p. 29, line 25). Prior to the time of the accident plaintiff was not aware that the vessel had been loading wheat. The hatch at the weather deck level simply was in a condition for sea (p. 11, lines 29, 30), and the hatch was covered (p. 11, line 25), and without warning plaintiff would have no notice of the existing condition below deck. Plaintiff states that the cause of the accident was due to the dust mostly (p. 30, line 6), and not the actual wheat kernels, although the kernels of wheat were quite liberally scattered all over the hatch (p. 13, lines 27, 28).

Mr. Dibble, Super Cargo for the vessel, stated that he had no recollection of the stevedores cleaning No. 7 hatch while the vessel was in Seattle. In

fact, he could not recollect whether or not the hatch had been actually cleaned in Tacoma (p. 43, line 13). Mr. Patterson, Stevedore Foreman, stated that at the time of the trial he did not remember having observed the stevedores working in No. 7 hatch cleaning up the tween deck (p. 46, line 4). Whether it was actually cleaned is better determined by the testimony of Mr. Hearst (p. 5, line 12), who said it took at least an hour or more to clean up the ship so that it would be safe to work. This cleaning operation is usually looked after by the ship's personnel, Mr. Patterson, defendant's own witness, stating that the ship's personnel keeps their decks clear as a rule (p. 46, lines 27, 28).

Mr. Patterson testified that he was engaged in unloading heavy lift tanks on another hatch and was practically engaged there on that particular hatch all the time (p. 46, lines 16, 17, 18). Mr. Patterson had simply ordered and directed the stevedores to uncover and discharge from the tween decks at No. 7 hatch. He was not aware of the unsafe condition, not having been in that vicinity during the discharging operation. His first notice of the dirty condition was the report made to him by plaintiff after he had been injured while endeavoring to carry out his orders. He also distinctly remembered the plaintiff being injured and the cause of the plaintiff's injuries.

Mr. Dibble had no recollection of being around or looking down into No. 7 hatch on the Golden Gate on April 28, 1953 (p. 41, line 12). The testi-

mony regarding the cleanup work done at Tacoma prior to the vessel's travel to Seattle does not show that the vessel actually did undergo cleaning at No. 7 hatch at the tween deck level. Mr. Dibble did not remember having ever examined that hatch (p. 43, line 1).

Mr. Patterson testified that the ship's personnel has a duty of keeping the decks of the vessel clear as a rule (p. 46, lines 24-28). The duty to keep the vessel's decks clear carries with it the implied duty of examination and investigation to determine whether or not those decks have been properly maintained. The vessel's personnel, namely, the officers and servants, have the express duty to provide the stevedore invitee with a safe place in which to work and a seaworthy vessel. The shipowner has a "nondelegable duty" to so provide. Lahde vs. Soc. Armadora Del Norte, 220 F. (2nd) 357. The defendant's officers, agents and servants were the only ones in the position of determining whether or not the plaintiff and his co-employees would be provided with a safe place in which to work, and obviously there existed ample time for them to examine the vessel's decks for defective conditions about which the plaintiff would be obliged to carry out his duties. The wheat had been loaded in Tacoma, Washington (p. 42, line 4). Whether or not the vessel's hold after the loading operation was properly cleaned was never determined by the testimony of the defendant's own witnesses. In fact, whether anyone cleaned the hold at all could not be recollected by the Super Cargo, Mr. Dibble (p. 42, line

16). The defendant could never relinquish the control of the vessel as to the maintenance of said vessel to the stevedores employed by the defendant in Tacoma. They had the absolute duty to see to it that the vessel was in a safe and seaworthy condition, particularly as to stevedore invitees, who would board the vessel and perform the cargo operation.

In The Joshua W. Rhodes, 529 Fed. 604, it clearly defines the law regarding the responsibility of the vessel owner to furnish a proper and reasonably safe passway for the plaintiff's use in the performance of his work. Even though plaintiff may have been able to perceive the dust and wheat kernels on the deck had he more closely examined the deck, he cannot be held negligent for assuming the deck and passway would be safe for him to pursue his duties.

The condition which caused plaintiff's injury was admittedly dangerous. Defendant contends that the officers and crew of a vessel must have actual notice of the existence of a dangerous condition. This contention is not the law of our jurisdiction. On Monday, October 10, 1955, the Supreme Court of the United States denied certiorari in the Lahde case (supra) which arose in this jurisdiction. In that case the longshoreman went aboard a vessel for the first time and went down into the hatch where he was injured by a dangerous condition, as was the plaintiff in this case. The Ninth Circuit Court of Appeals held that the ship was liable, whether or

not anyone knew of the existence of the dangerous condition at the time of the injury. The Supreme Court upheld the decision of the Circuit Court. Insofar as the requirement of actual or constructive notice is concerned, the defendant, its agents, officers and servants were in the position to know of the danger and likewise were in the superior position to guard against the admittedly hazardous condition. The defendent contends that the plaintiff's employer was negligent in sending plaintiff into the area where the defective condition existed. Plaintiff and his employer are charged only with the care of a reasonably prudent man. They could assume as invitees on board the vessel that the vessel would provide them with a safe place in which to work, free from defects and in a seaworthy condition. That duty to so provide cannot be relinquished by the vessel and its owners.

The testimony of the defendant's doctor, due to its confused nature, cannot be given credence insofar as his medical conclusions are concerned. His actions in furnishing treatment over a long period of time clearly contradict his testimony on lack of symptoms. His answers were also very evasive and he in no way exhibited a frank attitude in his response to direct questions. Further, he convicted himself of running up charges for a long period of time in treatment of a patient with whom he said he could find nothing wrong.

He says that when he first saw Mr. Maloney, there were no findings of any trouble (p. 49, line

23). However, instead of sending him away, he put his wrist in a splint and prescribed X-ray treatments (p. 49, line 29; p. 50, line 1). He then continued to see him and treat him. He had him in the splint from January 11, 1954 (p. 49, line 13), and told him not to work until February 23, 1954 (p. 51, line 28); he had him wear the splint thereafter and continued to see and treat him regularly. This treatment consisted of cortisone (very expensive) (p. 62, line 29) and X-ray (p. 55, line 15). When asked why he gave cortisone (p. 62, line 30), the vague, ambiguous and evasive nature of his testimony is clearly revealed:

"Q. Why did you give him cortisone?

"A. Because cortisone has relieved discomfort in the wrist.

"Q. Discomfort from what?

"A. From anything."

The only clear, frank, cogent, expert testimony in the medical part of the record is that elected from Dr. Gray, who gave plaintiff a permanent disability of the wrist as caused by his accident.

The plaintiff's statement of his present wage loss, due to his injury in the amount of $2,300, is in no way contradicted. His 1952 earnings as cited by defendant have been adequately explained (p. 38, line 6). In that year he was not a fully registered longshoreman entitled to full work opportunity. He was merely working extra and obtaining the leavings after the employers had dispatched the regular men to work.

Plaintiff having been trained for no other work than that of hard and arduous labor, is destined to continue his chosen field with a decided disability. He has lost considerable time and employment to date because of his injury, and the future outlook as to the restoration of his full capabilities is unfavorable at this time. Plaintiff reiterates his arguments with full intensity referring to pages 5 and 6 of plaintiff's opening argument.

Because of the unsafe place in which plaintiff was obliged to carry out his duties, the negligence and carelessness of the defendant's agents, officers and servants in improperly maintaining the vessel's decks, and which negligence was the proximate cause of plaintiff's injuries, together with the fact that the vessel was unseaworthy, plaintiff sustained injuries compensable only in damages at a fair and reasonable value as follows:

| | |
|---|---|
| Pain and suffering at $500 per annum | $14,415.00 |
| Past wage loss (2 years) | 2,300.00 |
| Future wage loss (26.43 years) at $1,000 per annum | 26,430.00 |
| Total | 043,145.00 |

Respectfully submitted,

ZABEL & POTH,

By /s/ PHILIP J. POTH,
Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed October 12, 1955.

United States District Court, Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

## OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the morning of June 28, 1953, plaintiff, Shaun Maloney, in the course of his employment as a stevedore, was ordered along with others to uncover No. 7 hatch of the vessel Golden Gate and to descend to the 'tween-deck and there to discharge cargo from the vessel. He was the first to descend and after taking a step or two from the ladder, plaintiff slipped and fell, thereby injuring the wrist of his right hand, as will hereinafter appear. After the injury he continued his work on the ship.

Plaintiff received physical therapy treatments from Dr. Smith and was on December 28, 1953, examined by Dr. Bernard Gray, a well-qualified physician and surgeon specializing in orthopedic and traumatic surgery. In response to an inquiry as to what his examination disclosed, Dr. Gray testified:

"He [plaintiff] told me that he had been hurt six months previously on June 28, 1953. He was a

longshoreman aboard a vessel and he stated that he slipped on some wheat apparently and in order to catch himself—or, he caught himself on his wrist and in so doing he hyperextended or bent his wrist backward rather forcefully. He said that he had immediate pain and his wrist became very painful and swollen by the next day. He consulted his doctor, Dr. Smith, who put him on treatment at that time.

"He had no time loss and he states that he favored his wrist for a couple of months and it tended to improve for a while and then got worse. He said he had never hurt his wrist before. He was right handed. At the time I first saw him I noted that as far as examination was concerned, there was ten degrees limitation of motion forward and backward at the wrist. That the grasping power of the hand was weak and there was some swelling at the top of the wrist and the circumference of the wrist was three-eighths of an inch greater than the left. I made some X-rays at the time which revealed nothing significant. I advised that he wear a leather cuff, a so-called Colles cuff, which would immobilize the wrist and take the load off of it. I suggested he come back and see me in about ten days and that was the last I saw of him until a few days ago."

In response to the inquiry, "What did you find on this examination?" Dr. Gray continued:

"I saw him August 1, 1955. He told me that after I had seen him he had been seen again by his doctor

who immobilized the wrist in plaster for a few weeks and advised surgery to the wrist. He was then sent to Dr. Morris Dirstine who examined him and recommended X-ray treatment and applied the cuff which had been recommended. At that time he was off work for an interval. X-ray treatment did not contribute much to his relief. He had been working since that time, most of the time doing lighter work. At the time I saw him he was driving a bull. [A small truck used to lift loads.] If his work would tend to be heavy he wore his cuff. He had certain residual complaints with reference to the right wrist. He had pain in lifting, especially if the hand was in hyperextension, with the wrist bent backwards. Any exertion caused pain and tended to persist for variable lengths of time. The swelling or lump he had at the back of the right wrist would blow up at times and quieten down at times, but there always was some swelling there and the only relief he could get was if he did not exercise his wrist or if he wore his cuff. At the time I examined him I thought that the range of motion was the same as before. There was some limitation of motion, ten degrees, which can be estimated as equivalent to about fifteen per cent. There was a small ganglion or lump at the back of the right wrist which was tender and which could be made to enlarge by bending the hand down. There was slight weakness of grip in the hand, but this was not marked. There was pain on forced motion of the wrist. This is about the extent of the findings on ex-

amination. I took new X-rays which showed no change and nothing significant.

"* * *

"Oh, I think that he has got a stationary condition, or, the basis of the condition is stationary. I think that with over-exertion he will have aggravation. I think he will probably end up having surgery on this wrist and an attempt made to remove this ganglion.

"* * *

"If removal of the ganglion is successful I think he will have some improvement. If it is not successful, or if it will recur, his condition will be the same. I think the stiffness of the wrist, whatever degree of limitation of motion he has, will be permanent, whether the ganglion is removed or not. I think if he did light work for a long period of time the tendency would be that he would feel pretty good, but when he went back to heavy work he would have some trouble in his wrist again."

And further the Doctor testified:

"Oh, I think the function of his right wrist has been limited and will be limited. If I was going to estimate the degree of permanent disability, I would estimate it at between fifteen and twenty per cent of the loss of the hand at the wrist."

The plaintiff, a forthright and fair witness, testified that his calculated loss of time as as result of the injury was 184 days representing a loss of about $2,300 in wages. As we have seen, this loss of time

occurred after December 28, 1953, the day of his first visit to Dr. Gray. It is evident that after the injury he carried on his work with pain and discomfort and that he will continue to suffer pain in the performance of work involving the use of his wrist.

At the time of the injury, June 28, 1953, plaintiff was 41 years of age and in sound health. He had been a longshoreman for 5 years prior to his injury, June 28, 1953, and for 10 years before his experience as longshoreman, he had been a sailor in the Merchant Marine. The testimony does not disclose that he has had training qualifying him to earn his living other than by means of physical toil.

From the cross-examination of plaintiff we learn that he earned as a longshoreman in the year 1952, $2,383.32; in 1953, $4,663.28; and in 1954, $2,988.32. His job opportunity was not as good in 1952 as it was in 1953 and subsequently. This he explained by pointing out as follows:

"Well, first, the regular longshoremen get the first—the fully registered men on the basis of seniority get the first chance at the job. Any work left over comes to the temporary pool or the partially registered men."

Some of the differences in annual pay are explained by the increased job opportunity by being placed on the fully registered board and the lay-off, due to the complained of injury, of 184 days, and the fact that due to a sprained ankle to was

unable to work from September 18, 1954, until December 6, 1954.

The method of ascertaining damages used by Chief Judge Leahy, District of Delaware, in Yates v. Dann, 124 F. Supp. 125 on 133, is applicable to the situation here. In his opinion the Judge stated:

"[1, 2] Where physical disability in a particular case is such it may extend for a period of time or permanently into the future, the method of ascertaining the measure of damages is by determining the loss of earning power rather than to measure future losses by referring to past losses. A man may have a physical disability which would justify him in accepting only limited employment with a corresponding lower rate of pay, but because of economic necessity a man may assume duties beyond his physical capacity in order to earn a higher rate of pay.

"This question was presented to the Supreme Court of Pennsylvania, in Bochar v. J. B. Martin Motors, 374 Pa. 240, at page 244, 97 A. 2d 813, at page 815: 'The defendants contend that there was no evidence of impairment of earning power and that the fact that Bochar's wages were higher after the accident than before proves no deterioration of earning ability. A tort feasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident. Parity of

wages may show lack of impairment of earning power if it confirms other physical data that the injured person has completely recovered from his injuries. Standing alone, however, parity of wages is inconclusive. The office worker, who loses a leg has obviously had his earning ability impaired even though he can still sit at a desk and punch a comptometer as vigorously as before. It is not the status of the immediate present which determines capacity for remunerative employment. When permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tort feasor's negligence? That is the test. And it is no answer to that test to say that there are just as many dollars in the patient's pay envelope now as prior to his accident. The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages.' (Emphasis added.)"

William Patterson, a witness called on behalf of the defendant, testified that on June 28, 1953, he was aboard the vessel Golden Gate as head stevedore foreman. After such testimony, the following colloquy occurred:

"The Court: I would like to ask a question at this point. The gentleman testified he was employed by Grace Line Steamship. Is that the same company mentioned in paragraph IV of the complaint, the W. R. Grace Company.

"The Witness: They are agents for them.

"The Court: The point is, if there is any variance I want to know if there is going to be any point made of it.

"Mr. Holland (Attorney for Defendant): Perhaps I could explain and counsel can correct me if I am not correct. I think W. R. Grace & Company does stevedoring operation and they were the stevedoring contractor for this particular job and were in effect the plaintiff's employer. I think at the same time they also act in another capacity as local agent for the Johnson Line, which is a foreign corporation and therefore acted as agent and stevedoring contractor.

"The Court: If there was technically any variance, you make no point of that.

"Mr. Holland: There is no point of that, your Honor."

The above constitutes an admission that as an independent contractor, the W. R. Grace Company hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract and the plaintiff, at all times mentioned in the complaint, acted under the orders of the W. R. Grace Company, in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

From a consideration of all the evidence, plaintiff's injuries were proximately caused by the negligence of the defendant without any contributory negligence on the part of the plaintiff.

The Court makes its Findings of Fact and Conclusions of Law as follows:

## Findings of Fact

1. The facts recited in the discussion above are hereby adopted as the Court's Finding No. 1.

2. That at all times mentioned in plaintiff's complaint, he was and is now a resident of Seattle, King County, Washington, in the Western District of Washington, Northern Division.

3. That at all times mentioned in the complaint, Johnson Line, a corporation, was a foreign corporation doing business in Seattle, King County, Washington, and the owner and operator of the steamship Golden Gate, which vessel was employed as a merchant vessel in navigable waters at Seattle, Washington.

4. That prior to the 28th day of June, 1953, the defendant entered into a contract with the W. R. Grace Company, said company agreeing to act, and acting at all times mentioned in the complaint as an independent contractor, having complete control and supervision of all operations pertaining to the loading and discharge of cargo from said vessel Golden Gate in the Port of Seattle, in the navigable waters of Puget Sound, Seattle, Washington.

5. That as an independent contractor, said W. R. Grace Company hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract, and the plaintiff, at all

times mentioned in the complaint, acted under the orders of the said W. R. Grace Company in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

6. That plaintiff, pursuant to §933 of Title 33 U.S.C.A., has elected to recover damages against a third person other than his employer, viz., the said defendant, and plaintiff has notified the Commissioner of this District, administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901 et seq., of said election.

7. That on or about the 28th day of June, 1953, at about the hour of 8:30 a.m., plaintiff was obliged, in the course of his employment, to descend to the 'tween-deck of No. 7 hatch of the said vessel Golden Gate. That he and other stevedores were instructed by their foreman to uncover the hatch and go in 'tween-deck and discharge the cargo in the lockers and wings. That plaintiff was the first of the group to descend and the descent was made by means of a steel ladder. That after taking a step or two, after his descent, plaintiff slipped and in trying to maintain his balance, extended his right hand and suddenly and violently fell to the surface of the said 'tween-deck in such a manner as to cause the weight of his fall to be borne on the ends of his fingers and the forepart of his hand, and that as a result of said fall, plaintiff sustained severe and permanent injuries to his right wrist and that by reason of said injuries, he has been permanently

disabled in the exercise of his occupation as a longshoreman, and has lost wages and will continue to lose wages. That by reason of said injuries, he has been caused to suffer great pain and will continue to suffer great pain in the future and may be obliged to submit to surgical treatment.

That prior to the time of receiving said injuries, plaintiff was an able-bodied man of the age of 41 years and had a life expectancy of 28.43 years.

8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendant, its officers, agents or employees.

9. That plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris —wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and the slippery condition of the said surface was due to the negligence and carelessness of the defendant.

That plaintiff's fall and injuries resulting there-

from were occasioned solely by reason of the negligence of the defendant.

That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom.

10. That by reason of the hereinabove described injuries, pain and suffering, and of the impairment of plaintiff's ability to engage in his present occupation, plaintiff has been damaged as follows:

| | |
|---|---|
| For past and future pain and suffering | $10,000 |
| Loss of future earnings | 10,000 |
| Loss of earnings from time of accident to trial | 2,300 |
| Total | $22,300 |

## Conclusions of Law

As conclusions of law from the foregoing facts, the Court decides:

1. That this Court has jurisdiction of the parties and the subject matter of this suit.

2. That the proximate cause of plaintiff's injuries was the failure to provide plaintiff with a safe place in which to work, and the careless and negligent manner in which said 'tween-deck was maintained in that there was allowed to accumulate upon its surface wheat dust and kernels which rendered said surface slippery and caused plain-

tiff to slip, fall and injure himself as aforesaid. That said defective and unsafe condition was the proximate cause of plaintiff's injuries, and that said condition was known, or should have been known by defendant, its agents, servants and employees in the exercise of reasonable and ordinary care.

3. That the condition of said 'tween-deck surface was unknown to plaintiff prior to his slipping and falling thereon and that the injuries resulting therefrom, all were without fault or negligence on the part of the plaintiff.

4. That plaintiff, Shaun Maloney, by reason of the said personal injuries and the pain and suffering and loss of earnings resulting therefrom, is entitled to judgment in the sum of $22,300, and for his costs incurred herein.

Let Judgment Be Entered Accordingly.

Dated: This 14th day of February, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed February 23, 1956.

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[Title of District Court and Cause.]

## MOTION FOR RECONSIDERATION

Comes Now the defendant Johnson Line and moves this honorable Court to reconsider the find-

ings of fact and conclusions of law in the above matter and in connection with said reconsideration to permit oral reargument thereon.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1956.

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[Title of District Court and Cause.]

## MOTION FOR NEW TRIAL

Comes Now the defendant Johnson Line and moves the Court for a new trial in the above-entitled action in which judgment was entered on or about February 28, 1956, on the following grounds:

1. Insufficiency of the evidence to support the amount of damages awarded to the plaintiff and that as a result thereof the judgment entered herein is excessive.

2. Error in law at the trial in the failure of the Court to apply the doctrine of transitory unseaworthiness and under that doctrine in failing to find that defendant did not have actual or constructive notice of the alleged unsafe condition of the vessel.

This motion is based upon the file herein, upon the transcript of testimony and upon the attached affidavits of Robert V. Holland and James R. Shields.

Dated at Seattle, Washington, this 2nd day of March, 1956.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

## AFFIDAVIT OF ROBERT V. HOLLAND

State of Washington,
County of King—ss.

Robert V. Holland, being first duly sworn on oath deposes and says:

That he is the attorney for the defendant in the above-entitled matter and makes this affidavit in support of the defendant's motion for new trial.

That your affiant has reviewed the earnings record of Shaun Maloney as contained in the files of Waterfront Employers Association of Washington and has found that the records indicate the following earnings for Maloney immediately subsequent to his injury of June 28, 1953:

| Week Ending | S. T. Hours | O. T. Hours | Total Amt. of Wages |
|---|---|---|---|
| 6/29/53 | 10 | 13 | $ 63.72 |
| 7/ 6/53 | 22 | 8½ | 75.06 |
| 7/13/53 | 30 | 27¾ | 155.53 |
| 7/20/53 | 24 | 18 | 110.16 |
| 7/27/53 | 18 | 14¼ | 85.05 |
| 8/ 3/53 | 24 | 24¾ | 132.43 |
| 8/10/53 | 10 | 19¼ | 83.97 |
| 8/17/53 | 16 | 13¼ | 77.49 |
| 8/24/53 | 6 | 9½ | 44.40 |
| 8/31/53 | 18 | 23¼ | 116.58 |
| 9/ 7/53 | 12 | 21½ | 95.58 |
| 9/14/53 | 11 | 21 | 99.25 |
| 9/21/53 | 24 | 25 | 133.34 |

| Week Ending | S. T. Hours | O. T. Hours | Total Amt. of Wages |
|---|---|---|---|
| 9/28/53 | 18 | 15¼ | 89.14 |
| 10/ 5/53 | 22 | 25 | 129.31 |
| 10/12/53 | 22 | 15¾ | 98.95 |
| 10/19/53 | 16 | 27¼ | 123.66 |
| 10/26/53 | 29½ | 7½ | 89.35 |
| 11/ 2/53 | ---- | 18 | 58.32 |
| 11/ 9/53 | 24 | 26 | 136.89 |
| 11/16/53 | 18 | 10½ | 72.90 |
| 11/23/53 | 17½ | 23 | 112.47 |
| 11/30/53 | 12 | 13½ | 69.66 |
| 12/ 7/53 | 10 | 3 | 31.32 |
| 12/14/53 | 24 | 16½ | 105.98 |
| 12/21/53 | 6 | 11½ | 50.22 |
| 12/28/53 | 12 | 5 | 42.12 |

That your affiant has taken the earnings of the plaintiff for the year 1953 in the amount of $2,988.32 and has projected the same for the entire year since the plaintiff's testimony indicated that he was off work from September 18 to December 4, 1954, because of an ankle injury. That these figures indicate that the earnings of the plaintiff for the year (but for the injured ankle) would have approximated $3,787.28.

That the plaintiff testified that for the year 1955 up to August 1, 1955, the date of trial, he earned the sum of between $2,700.00 and $2,800.00. That your affiant has projected the sum of $2,750.00 for this period of time through to the balance of the year and has determined that the plaintiff's earnings for the total year of 1955 would have approximated $4,690.42.

That the projected earnings of the plaintiff for 1955 as set forth immediately above exceeds the

largest of any year's earnings as testified to by the plaintiff.

That your affiant is aware of the plaintiff's ability to pursue his normal occupation including the act of climbing up and down ship's ladders. This information is possessed by your affiant as a result of a current file being handled by your affiant entitled Shaun Maloney v. Calmar Steamship Corporation which involves injuries sustained by the plaintiff on February 1, 1956, while climbing down a ship's vertical ladder.

/s/ ROBERT V. HOLLAND.

Subscribed and sworn to before me this 9th day of March, 1956.

[Seal] /s/ EDW. S. FRANKLIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

## AFFIDAVIT OF JAMES R. SHIELDS

State of Washington,
County of King—ss.

James R. Shields, being first duly sworn on oath hereby deposes and says:

That he is employed by Waterfront Employers Association in charge of payroll records.

That the Waterfront Employers Association is an organization of stevedores and stevedore contractors one of whose functions is to consolidate the payments of all earnings to stevedore and long-

shore employees. That the payments of said earnings and the keeping of records thereof are handled through the Waterfront Employers record section.

That the records of said section indicate the following gross earnings for Shaun Maloney for the period August 1, 1955, to February 27, 1956: $2,040.50.

/s/ JAMES R. SHIELDS.

Subscribed and sworn to before me this 9th day of March, 1956.

[Seal] /s/ ROBERT V. HOLLAND,
Notary Public in and for the State of Washington, Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 9, 1956.

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In the District Court of the United States for the Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

JUDGMENT

The above-entitled matter having duly come on for trial before the Court without a jury, on the

3rd day of August, 1955, and the plaintiff appearing in person and by his attorneys, Philip J. Poth and Milton H. Soriano of Zabel & Poth, and the defendant being represented by Bogle, Bogle & Gates and Robert V. Holland, and testimony having been offered and briefs filed by both parties, and the Court having filed its Memorandum Opinion and Findings of Fact and Conclusions of Law and Order for Judgment, Now, pursuant to said order for judgment, it is hereby

Ordered and Adjudged that the plaintiff, Shaun Maloney, have judgment against the defendant, Johnson Line, a corporation, in the sum of Twenty-two Thousand and Three Hundred Dollars ($22,300.00), together with interest thereon at the date of this judgment at the rate of six per cent (6%) per annum, and for costs and disbursements in this action to be hereinafter taxed, on notice, and hereinafter inserted by the Clerk of this Court in the sum of $46.60.

Done this 1st day of March, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

Approved and Notice of Presentation and Entry waived.

ZABEL & POTH,

By /s/ MILTON H. SORIANO,
Of Counsel for Plaintiff,
Shaun Maloney.

Approved as to Form and Notice of Presentation and Entry waived.

BOGLE, BOGLE & GATES,

By /s/ ROBERT V. HOLLAND,
Of Counsel for Defendant.

[Endorsed]: Filed and entered March 12, 1956.

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March 13, 1956.

Milton H. Soriano,
518 Fourth and Pike Bldg.,
Seattle, Washington.

Robert V. Holland,
603 Central Bldg.,
Seattle, Washington.

Gentlemen:

Re: Shaun Maloney vs. Johnson Line, a Corp.—Cause 3678.

Pursuant to Rule 77(d) F.R.C.P., you are hereby notified that Judgment for plaintiff in sum of $22.-300.00 and costs of $46.60 was signed by Judge Roger T. Foley on March 1, 1956, and filed and entered in this office on March 12, 1956.

Yours very truly,

MILLARD P. THOMAS,
Clerk.

JT:t

[Title of District Court and Cause.]

## REPLY OF PLAINTIFF TO DEFENDANT'S MOTION FOR NEW TRIAL

Comes now the plaintiff and respectfully submits that defendant's Motion for New Trial should be denied by this honorable Court on the following grounds:

I.

That the amount of damages is adequately supported by the evidence.

II.

That there is no error in law.

III.

That there is no newly discovered evidence or evidence that defendant was prevented from producing at the trial which would entitle defendant to a new trial.

a. That plaintiff has sustained as great or even greater loss of earnings since the time of trial.

b. The matter of plaintiff's past earnings were fully before this Court at the trial of this cause. The office manager of Waterfront Employers of Washington in charge of keeping Mr. Maloney's earnings at the time of his injury was produced at the trial as a witness in behalf of the defendant. He even made a graph of his earnings. Full opportunity was accorded the defendant in this regard. No ground for claiming newly discovered evidence can be asserted by now restating Mr. Maloney's

work record on a weekly, instead of daily, monthly or annual basis. Actually the great variation in the number of hours worked in the weeks following his injury corroborates Mr. Maloney's testimony that he had to lay off from time to time because of the swelling in his wrist, and his inability to perform the harder types of work, and that subsequent to the weekly periods set forth in defendant's affidavit, the plaintiff was required to stop work completely while his wrist was placed in a splint and intensified medical treatment undertaken.

c. That the plaintiff, Shaun Maloney, is not engaged in subsequent litigation.

This Reply is based upon the file herein, the transcript of testimony and affidavits of Shaun Maloney, Samuel H. Bayspoole and Bennie Kongsle hereto annexed.

ZABEL & POTH,

By /s/ PHILIP J. POTH,
Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT

State of Washington,
County of King—ss.

Shaun Maloney, being first duly sworn, on oath, deposes and says:

That he is the plaintiff herein; that his earning capacity has not increased since the trial of the ac-

cident; that his ability for work is still impaired by reason of his injury; that workmen employed with him have earned approximately one-third more wages than he has; that his earnings for the year 1955, were in the amount of $4,505.68, whereas fellow workmen have made in excess of $6,000.00 for the same period; that the reason for the continued disparity in his wages is that his condition still causes him considerable wage loss due to the painful swelling of his wrist.

Affiant declares that he has had continued difficulty in performing his work but denies that he is maintaining any subsequent lawsuit and particularly denies that there is any suit in existence entitled, Shaun Maloney vs. Calmar Steamship Corporation, or that any demand has been made on threat of suit, or that he has authorized anyone to commence suit or make demand in his behalf.

/s/ SHAUN MALONEY.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] /s/ MILTON H. SORIANO,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Title of District Court and Cause.]

## AFFIDAVIT

State of Washington,
County of King—ss.

Samuel H. Bayspoole, being first duly sworn, on oath, deposes and says:

That he is a longshoreman employed on the Seattle waterfront with Shaun Maloney, the plaintiff above-named; that during the year 1955, your affiant earned the sum of $6,601.77; that he knows that Shaun Maloney has been unable to earn as much money as the rest of the longshoremen, because of an injury to his wrist which has prevented him in the past and still prevents him from all types of work.

Further, affiant sayeth not.

/s/ SAMUEL H. BAYSPOOLE.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] /s/ MILTON H. SORIANO,
Notary Public in and for the State of Washington, Residing at Seattle.

[Title of District Court and Cause.]

## AFFIDAVIT

State of Washington,
County of King—ss.

Bennie Kongsle, being first duly sworn, on oath, deposes and says:

That he is acquainted with Shaun Maloney by reason of working with him as a longshoreman; that both he and Shaun Maloney have the same job opportunity, but Shaun Maloney is unable to do all of the work that the rest of the longshoremen are able to do because of a painful and swollen wrist which keeps him from doing all types of work and at times requires him to check out on a job because of the difficulties he experiences; that in the year 1955, this affiant earned $6,529.98.

Further, affiant sayeth not.

/s/ BENNIE KONGSLE.

Subscribed and sworn to before me this 16th day of March, 1956.

[Seal] /s/ MILTON H. SORIANO,
Notary Public in and for the State of Washington, Residing at Seattle.

Receipt of copy acknowledged.

[Endorsed]: Filed March 16, 1956.

United States District Court
District of Nevada

Judge's Chambers
Las Vegas, Nevada

Roger T. Foley
P. O. Box 889

April 10, 1956.

Mr. Millard P. Thomas,
Clerk,
United States District Court,
308 U. S. Court House,
Seattle 4, Washington.

In re: Maloney v. Johnson Line, No. 3678.

Dear Mr. Thomas:

You will find enclosed copies of letters addressed to counsel for plaintiff and defendant in the above-entitled matter.

Please enter an Order in the minutes of the Court as follows:

> That the motion for new trial in the above matter stand submitted twenty (20) days after the date of entry of this Order and that counsel for plaintiff and defendant may file memorandum of authorities in support of their respective contentions on or before the expiration of said twenty (20) days.

With best wishes to you and all of our friends in Seattle, I am

Very truly yours,

/s/ ROGER T. FOLEY,
U. S. District Judge.

Encls.

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In the United States District Court, Western District of Washington, Northern Division

SHAUN MALONEY,
Plaintiff,

vs.

JOHNSON LINE, a Corporation,
Defendant.

## ORDER ON DENYING MOTION FOR NEW TRIAL

Defendant Johnson Line moves for a new trial upon the following grounds:

1. Insufficiency of the evidence to support the amount of the damages awarded to the plaintiff, and that as a result thereof the judgment entered herein is excessive.

2. Error in law at the trial in the failure of the court to apply the doctrine of transitory unseaworthiness, and under that doctrine, in failing to find that defendant did not have actual or con-

structive notice of the alleged unsafe condition of the vessel.

This action was brought pursuant to Section 933 of Title 33, United States Code Annotated, and in an action pursuant to the same statute, The Wearpool, 112 Fed. (2) 245, 246, the Circuit Court of Appeals of the Fifth Circuit confirmed the findings of the Court below and stated:

"It is elementary that it is the duty of a vessel to provide a reasonably safe place for longshoremen to work and reasonably safe means of access to the part of the ship in which they are to perform their duties. The evidence in the record supports the findings of facts by the District Judge and we concur in his conclusion as to the liability of the vessel * * *"

Among the findings in this case are the following:

"Finding 8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendant, its officers, agents or employees.

"Finding 9. The plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was

rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris—wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and the slippery condition of the said surface was due to the negligence and carelessness of the defendant.

"That plaintiff's fall and injuries resulting therefrom were occasioned solely by reason of the negligence of the defendant.

"That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom."

The above and other findings are amply supported by the evidence.

Judge Hawley of the Nevada District, speaking for the Circuit Court of Appeals, Ninth Circuit, in The Joseph B. Thomas, 86 Fed. Rep. 658, 660, in a case where the relationship of the parties was identical to that here, stated:

"What are the principles of law applicable to this case?

"1. What duty did appellants owe to appellee? Their duty was to provide him a safe place in which to work, and to exercise ordinary and due diligence and care in keeping the premises reasonaly secure against injury or danger. This is the pith and substance of all the decisions upon this subject as ex-

pressed in the great variety of cases, each having reference to the special facts and surroundings of the evidence relating thereto. * * *"

In the recent case Lahde v. Soc. Armadora del Norte, a Corporation, 220 Fed. (2), 357, 361, the Court of Appeals of the Ninth Circuit reaffirmed the Thomas case, supra, in its holding that a ship owner has to invitee stevedores, as to its sailors, the duty to furnish a safe place to work, and that duty is non-delegable.

The framers of the Complaint here commingled a claim for damages based upon negligence with a claim based upon the alleged unseaworthiness of the vessel. These claims were not separately stated as in the complaint in Daniels v. Pacific-Atlantic Steamship Company, 120 F. Supp. 96 (D.C.E.D. N.Y.). The findings in the present case if not adequate on the question of unseaworthiness are sufficient as to negligence, and the effect given by this Court of such findings find support in Lahde v. Soc. Armadora del Norte, supra, and is Pope & Talbot v. Hawn, 346 U. S. 406, 413, where the Supreme Court of the United States held the plaintiff, not being a seaman, is not barred by the Osceola, 189 U. S. 158, from maintaining a negligence action against the shipowner, saying:

"The fact that 'Sieracki' upheld the right of workers like Hawn to recover for unseaworthiness does not justify the argument that the Court thereby blotted out their long recognized right to recover in admiralty for negligence."

Unlike the facts in Daniels v. Pacific-Atlantic Steamship Company, supra, there is evidence here that the wheat dust and wheat kernels were present on the surface of the 'tween-deck for a considerable length of time prior to the accident.

The Court sees no merit in the contention that the amount of damages awarded is excessive.

The Motion for New Trial is denied upon all the grounds urged.

Dated: This 6th day of July, 1956.

/s/ ROGER T. FOLEY,
United States District Judge.

[Endorsed]: Filed July 11, 1956.

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO
COURT OF APPEALS

Notice is hereby given that Johnson Line, a corporation, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on March 12, 1956.

Dated August 1, 1956.

BOGLE, BOGLE & GATES,
Attorneys for Defendant.

[Endorsed]: Filed August 3, 1956.

[Title of District Court and Cause.]

## COST BOND ON APPEAL

Know All Men by These Presents:

That we, Johnson Line, a corporation, as principal, and Fireman's Fund Indemnity Company, a corporation, as surety, are held and firmly bound unto Shaun Maloney in the full and just sum of Two Hundred Fifty ($250.00) Dollars, to be paid to the said Shaun Maloney, his successors, executors, administrators and assigns; to which payment, well and truly to be made, we bind ourselves, our successors, assigns, heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 3rd day of August, 1956.

Whereas, on March 12, 1956, in an action pending in the United States District Court for the Western District of Washington, Northern Division, between Shaun Maloney as plaintiff and Johnson Line, a corporation, as defendant, a judgment was rendered against the said defendant and the said defendant having filed a notice of appeal from such judgment to the United States Court of Appeals for the Ninth Circuit;

Now, Therefore, the condition of this obligation is such, that if the said defendant shall prosecute its appeal to effect and shall pay costs if the appeal is

dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said defendant if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

JOHNSON LINE,
A CORPORATION,

By BOGLE, BOGLE, & GATES,
Its Attorneys,
Principal.

FIREMAN'S FUND, INDEMNITY COMPANY, A CORPORATION,

By /s/ CASSUIS S. GATES,
Its Attorney in Fact,
Surety.

[Endorsed]: Filed August 3, 1956.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 3678

SHAUN MALONEY,

Plaintiff,

vs.

JOHNSON LINE, a Corporation,

Defendant.

## TRANSCRIPT OF TESTIMONY

### OSCAR HURST

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Oscar Hurst.

Q. Where do you live?

A. I live in Seattle; 428-26th South.

Q. What is your occupation?

A. My occupation is longshoring.

Q. How long have you been a longshoreman?

A. I have been longshoring pretty close to twelve years.

Q. What was your occupation on the 28th day of June, 1953?

A. My occupation was longshoring, stevedoring.

(Testimony of Oscar Hurst.)

Q. Where did you work on that day? [1*]

A. I worked over on the ship called the Golden Gate, I think it was.

Q. Whereabouts was that ship, if you remember?

A. I think that was at East Waterway, if I am not mistaken.

Q. What time did you go to work?

A. I went to work at 8 o'clock.

Q. Was that 8 o'clock in the morning?

A. 8 o'clock in the morning.

Q. And what hatch, if any, were you assigned to?

A. I just forget now. It was the after end of the ship. The after end of the ship.

Q. And what, if anything, did you do when you went to that hatch at the after end of the ship?

A. Well, the first thing we did was to—is to take off the tarpaulins and then take off the hatches and then descend below to work the cargo.

Q. Did you go below? A. Yes, I did.

Q. How did you go below? What means did you use? A. Well, we went down a ladder.

Q. Did anybody go down that ladder before you?

A. Yes, there were two or three men before me; at least two or three before me.

Q. Do you know who the first man down the ladder was? A. Yes, I do remember.

Q. Who was that? A. That was Maloney.

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***Page numbering appearing at foot of page of original Reporter's Transcript of Record.**

(Testimony of Oscar Hurst.)

Q. And is Maloney here in the courtroom?

A. Yes, sir.

Q. How long have you known Mr. Maloney? [2]

A. I have known him for quite some time.

Q. How many times have you worked with him, if you recall?

A. Yes. Different places and different times.

Q. What happened, if anything, that you saw after you went down there or started down?

A. Well, looking from the top deck you couldn't see much anyhow, but on my way down I heard him say, "Fellows, look out. It is quite dangerous down here. It is very slippery." He says, "I just fell." But I couldn't see what was going on or what happened because my back was to him coming down the ladder and in the meantime he hollered and says, "Look out. It is very slipperly down here."

Q. And what was the condition that you found there?

The Court: I want to make certain. His last statement didn't quite cover everything he said in his first statement. What was it Mr. Maloney said?

The Witness: He said, "Fellows, look out when you hit the deck. It is very slippery." He says, "It is dangerous. I just fell," he says.

Q. He said, "I just fell"?

A. "I just fell," yes.

Q. What was the condition, if any, down there that you found?

A. Well, I found a lot of dust from wheat and kernels of wheat all over the deck. I guess where

(Testimony of Oscar Hurst.)

they had been pouring wheat in the ship previous to the time and there was a lot of dust and it is very slippery on the deck there. The kernels, you slip and slide. [3]

Q. Did you work cargo there that morning?

A. Yes, we did. We worked cargo.

Q. What sort of cargo was it?

A. I just forget. It was bales and stuff like that, boxes.

Q. Did you load or discharge it?

A. Discharged it.

Q. And where was that cargo that you worked?

A. They were in the lockers and some were in the wings.

Q. On what deck? A. 'Tween-deck.

Q. Was there any wheat stowed in that 'tween-deck?

A. Yes, there must have been because——

Q. At that time?

A. Yes, there was wheat in that hatch and wheat on the floor from the feeder box. They had a big feeder box in the hatch and that feeder box was full of wheat and also on the deck there was dust and wheat all over the deck because Mr.——

The Court: We are referring to the deck that is below, isn't that it?

The Witness: Yes, sir.

Q. And when you got down what happened then, if anything?

A. Well, he said, "I hurt myself." He says, "We should clean this thing up before we do any-

(Testimony of Oscar Hurst.)

thing on the ship.'' So then we called for a net and some brooms and stuff that they have on the ship, some brushes, rather, on the ship and we started cleaning it up and got the trash net and then got it cleaned up so we could work the ship because it was too [4] dangerous to walk around there.

Q. Was that your job to clean that ship?

A. No, sir, that is not our job to clean those ships. It is our job to do stevedoring.

Q. What does stevedoring consist of?

A. Consists of moving and removing cargo, loading and unloading.

Q. How long before you started to load cargo that morning?

A. Oh, it must have been around about—I don't know—quite a little while because it took quite a bit of time cleaning up the ship. At least a hour or more.

Q. Had you been told to clean that ship up when you went down there?

A. No, they never told us nothing about cleaning up the ship.

Q. Had they warned you about the condition down there?

Mr. Holland: I object to that as leading.

The Court: Overruled.

Q. State whether or not anyone from the ship, that is the officers, the crew of the ship, or anyone had informed you or anyone in your hearing of any conditions existing in the hold of that ship before you went down?

(Testimony of Oscar Hurst.)

A. No, they never said a word. They said get down in the hold and get that cargo out.

Mr. Poth: I think that is all. [5]

The Court: I would like to ask a question. What was the condition there at the time Mr. Maloney went below as to whether there was any light in there?

The Witness: There was a little light, because it was—just the daylight, naturally of the hatch.

The Court: There was some daylight coming in there?

The Witness: A little, not too much.

The Court: All right.

Cross-Examination

By Mr. Holland:

Q. Mr. Hurst, had you ever been in that hatch before on that day until you went down on this occasion? A. No, I never have.

Q. You hadn't been on the vessel the previous day, had you? A. No.

Q. You don't know what the condition in that lower hold was at the time the vessel was at its last port prior to coming to Seattle, do you?

A. No, we don't. We never know.

Q. When you said that no one warned you and that they just told you to go below and get the cargo out? A. That is it.

Q. You are talking about the orders from your own—— A. Hatch tender.

Q. He is a member of your gang? [6]

(Testimony of Oscar Hurst.)

A. At the time.

Q. You had no conversations or discussions with any of the ship's crew, did you? A. No.

The Court: What was that last question?

(Last question and answer read by the reported.)

Q. How much of the area of that 'tween-deck hatch was taken up by the feeder box?

A. Now, I just forget now. I forget how much area, but at least—I know I saw a lot of wheat there. That is, the feeder box, I could just barely see it.

Q. Was there wheat in the feeder box?

A. Yes, there was wheat in the feeder box?

Q. How could you tell? Did you see that?

A. Well, we could see all around it. It was dark in that end. We could see something in there and it looked like wheat.

Q. Is the feeder box completely enclosed when you look at it in the 'tween-deck area?

A. Not enclosed, no.

Q. Where is the opening for the feeder box?

A. The opening is right in the center.

Q. On the 'tween-deck level?

A. Yes. Sometimes they stand above the deck a little bit.

Q. Did it in this case, stand above the deck?

A. I don't remember now if this stood above the deck or just even with the deck or not.

Q. We are talking about the 'tween-deck, aren't we? [7] A. Yes.

(Testimony of Oscar Hurst.)

Q. You could just go over and look down in the feeder box and see the wheat?

A. Well, we could if we could see back in there. As a rule most generally it is dark in that part of the ship.

Q. Did you on this occasion do that, look in the feeder box. Go down and look in the feeder box?

A. No, I didn't.

Q. In other words, the only way you know there might have been wheat there was because you saw some on the deck?

A. On the deck, yes.

Q. The feeder box could have been empty as far as you know personally.

A. No, we heard——

Q. I say, as far as you know personally.

A. It could have been, but it looked to me that there was wheat in there.

Q. You mean wheat around it? A. Yes.

Q. You didn't look in it?

A. I disremember now. I forget. It's been quite a while, whether they had a lot of wheat in there or not.

Q. Was this wheat on the deck mostly over by the feeder box, around it?

A. I don't get you.

Q. Was most of the wheat that was on the deck over near the feeder box? [8]

A. No, it was quite a ways from the feeder box, a little ways.

(Testimony of Oscar Hurst.)

Q. How far?

A. I don't know. I should say ten, fifteen, twenty feet, something like that; fifteen feet.

Q. Where was the cargo stowed in the 'tween-deck? A. In lockers.

Q. Out in the wings?

A. Well, in the wings and some in the forward end or after end, whichever end of the ship.

Q. Out away from the center of the hatch?

A. Yes, sir.

Q. What kind of cargo was it?

A. There was bales and different things. I forget now what. Bales, of course, you don't know what is in the cargo in the bales.

Q. Did you find it necessary to lay any boards or anything for your dollies? A. No.

Q. Did you use hand trucks?

A. We always do if it is heavy stuff, heavy cargo we use hand trucks.

Q. At the time you went below how much of the hatch at the main deck level, at the top level, was uncovered?

A. I just forget now whether we uncovered the whole thing or not. I don't think we did. No, we uncovered most of it, I am pretty sure we uncovered most of it.

Q. Most of it. That would have let plain daylight down into that hatch? A. Yes, some. [9]

Q. You uncovered enough for the gear to come down and pick up the cargo you were going to unload?

(Testimony of Oscar Hurst.)

A. Yes, we uncovered enough so we could get the gear down below.

Mr. Holland: I have no further questions.

Mr. Poth: Nothing further.

(Witness excused.)

SHAUN MALONEY

called as a witness in his own behalf, being duly sworn, testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Shaun McGillan Maloney.

Q. Where do you live?

A. 2338-22nd South, Seattle.

Q. What was your occupation on the 28th day of June, 1953? A. Longshoreman, stevedore.

Q. And had you received any directions where to work that day?

A. I had received directions the previous evening to report to the Golden Gate at the East Waterway Dock at 8:00 a.m., Sunday morning.

Q. What time did you arrive there?

A. I imagine about five minutes to eight. We start work at 8 o'clock.

Q. Where were you ordered to go to work aboard that ship?

A. To the fartherest hatch aft. I believe it was number [10] seven.

(Testimony of Shaun Maloney.)

Q. If you know, when had the ship come in?

A. Sometime during the night.

Q. If you know, had there been any longshoremen aboard the ship after she came in prior to the time you came aboard?

A. No, there was no one aboard, other than the crew.

Q. Do you know where she had come from?

A. She had come from sea. I don't know what port.

Q. When you got back to the number seven hatch —by the way, how many hatches were there aboard the vessel?

A. This particular ship is one of the new ones owned by the Johnson Line of Sweden and they have seven hatches.

Q. And one of the forward part is numbered number one, is that right?

A. That is right.

Q. And you were in the last one on the stern of the ship? A. That is right.

Q. What was the condition of that hatch at the weather deck level as you went down there?

A. As I recall there was the small punt or raft that the sailors paint with, a couple of other boxes on the deck, and that is all that was on the deck to my knowledege that I recall. The hatch was covered.

Q. How was it covered?

A. As is the usual manner, with pontoons or hatch covers and tarpaulins over them.

Q. As you saw the hatch was it in condition for sea? A. Yes, it was. [11]

Q. What is meant by having a hatch secured in condition for sea at the weather deck level?

A. When a hatch is secured for sea, the tarpaulins are battened down, there are cleats along the hatch coamings, there are iron bands in there to hold the tarpaulin tight to the hatch coaming, and there are cross battens across the top of the ship to hold the hatch boards or pontoons and the tarpaulins down. The hatches were covered, the tarpaulins were on and some wedges were in there, with no cross battens at this particular time on this particular ship.

Q. What did you do then?

A. First, we were instructed by the foreman to uncover and go in 'tween-deck and discharge the cargo in the lockers and wings.

Q. Did you see any members of the ship's company when you went aboard that vessel?

A. Yes, there were probably two or three standing around up on the midships section.

Q. Were you able to tell whether or not they were officers or simply members of the crew?

A. I would assume them to be unlicensed crew members because the officers on most all ships wear hats and caps and uniforms denoting their rank.

Q. After you removed—did anybody from the crew or any officer speak to you that morning?

A. None.

Q. Did you hear them speak to anyone else that morning?

(Testimony of Shaun Maloney.)

A. Not to my knowledge. I heard no conversation between [12] the crew members.

Q. After you removed the tarpaulins and the hatch covers as you have related, what next did you do? A. I started down the ladder.

Q. Where was this ladder located?

A. It is on the after end of the hatch, midships. That is, in the middle of the ship.

Q. What type of ladder was it?

A. It was a steel ladder, steel rungs welded into the after end of the hatch in the middle of the hatch I mean, in the middle section.

Q. That was part of the ship's permanent equipment?

A. Part of the ship's permanent equipment, yes, sir.

Q. Now, you say you went down the ladder. What happened, if anything, then?

A. When I come down the ladder, I was starting across the hatch towards the inshore side of the ship and I made a step or two and I slipped and I fell. In trying to catch my balance I extended my right hand and I fell on it, somehow, on the ends of the fingers and on the forepart of my hand.

Q. Did anybody proceed you down that ladder?

A. No, sir, I was the first man down.

Q. What, if anything caused you to slip and fall?

A. The hatch was covered with a heavy cover-

(Testimony of Shaun Maloney.)

ing of dust, wheat dust apparently from the feeder box and wheat kernels, kernels of wheat that were quite liberally scattered all over the hatch.

Q. And state the effect, if any, of that condition?

A. Well, it created a very slippery condition. You [13] couldn't stand up very well, and the wheat kernels if you would step on them would certainly cause you to lose your balance and fall, which I did.

Q. Did you have notice of that condition?

A. No.

Q. How is it that you had no notice of that condition before you go down there?

A. We had no instructions other than to go down to uncover and go to work, to get the cargo out of the 'tween-deck.

Q. When you came down the ladder or looked from the upper deck could you see that dust and wheat there?

A. No. I think we uncovered two sections of the hatch and it didn't appear from the weather deck level that there was anything exceptionally wrong on the 'tween-deck level.

Q. What happened after you fell?

A. Well, after I fell I picked myself up and I hollered to the other lads coming down the ladder to be careful that it was slippery, very slippery.

Q. Then what happened? What did you do, if anything?

(Testimony of Shaun Maloney.)

A. When the balance of the gang got into the hatch we decided that it was not safe to work and that before we done any work we would have to get some cleaning gear and clean the hatch up. That is, the section of the hatch where we were to work.

Q. How long have you been a longshoreman?

A. Five years.

Q. And before you were a longshoreman, what was your occupation? [14]

A. I was a sailor.

Q. In the Merchant Marine?

A. Yes, sir.

Q. How long were you a seaman in the Merchant Marine? A. Ten years, about.

Q. Are you familiar with the ordinary and regular duties of longshoremen? A. I am.

Q. Are you familiar with the custom and practices generally of sailors aboard ships?

A. I am.

Q. What is the custom and practice as between the two groups of keeping the decks of the vessel clean?

Mr. Holland: Now, if the court pleases, the portion of that question which would refer to the duties customarily of a crew of a vessel we would object to unless the witness states he served as a seaman aboard a Swedish vessel which for all we know may have completely different customs or practices.

The Court: I would like to have a little authority on that proposition. It just doesn't appear to

(Testimony of Shaun Maloney.)

me to be reasonable. It would seem to me it would be a duty imposed upon all crews. If there is duty on one it ought to apply to all other crews.

Mr. Holland: Well, I would agree as to American vessels on this coast and this country.

The Court: I will permit the question. If you can show me anything to the contrary we might consider the point later. The objection will be overruled. [15]

A. To my knowledge and experience it is always the responsibility of the mate of the ship who acts for the captain to keep the decks, the ladderways and the gang planks clear and clean at all times.

Q. Now, Mr. Maloney, I believe you mentioned you injured your wrist, is that correct?

A. Yes, sir.

Q. What wrist is that?

A. My right wrist.

Q. And before you had that fall what was the condition of your right wrist?

A. It was good, normal. I was able to do all the work that I was ever required to do with it without pain or discomfort.

Q. Had you ever injured it before?

A. No, sir.

Q. And what trouble have you had with it since?

A. Well, when I work on certain jobs it is much more worse than others. Some jobs it doesn't bother at all hardly, but now it bothers me where it becomes sore and I lose my grip and the arm, if it

(Testimony of Shaun Maloney.)

really is aggravated, I have pains up and down the arm.

Mr. Poth: Your Honor, the doctor has just come in the courtroom.

The Court: Would you like to take the doctor out of order so he could return to his office?

Mr. Poth: That would be appreciated.

Mr. Holland: No objection.

(Witness temporarily excused.) [16]

DR. BERNARD GRAY

called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination

By Mr. Poth:

Q. Will you state your name, please?

A. Bernard Gray.

Q. Where do you reside?

A. 1110 34th Avenue South, Seattle.

Q. Are you a licensed and practicing physician and surgeon under the laws of the State of Washington? A. Yes.

Q. And do you maintain offices in this city?

A. Yes.

Q. Where are those offices, Doctor?

A. In the Stimson Building, Fourth Avenue, Seattle.

Q. Do you practice any particular specialty?

A. Yes, orthopedic and traumatic surgery.

(Testimony of Dr. Bernard Gray.)

Q. What training have you had for your particular specialty, Doctor?

A. After I graduated for the University of Manitoba Medical School in 1935 I was surgical resident at the Deerlodge Hospital in Winnipeg and at Seaview Hospital in New York City. I had three years of orthopedic surgery at Permanente Foundation Hospital in Oakland, California.

Q. Are you a member of any societies or groups in connection with the practice of your profession, Doctor, and your specialty?

A. Yes, I am a Clinical Instructor in Orthopedics at the University of Washington Medical School, and [17] member of the Western Orthopedic Association.

Q. How long have you been teaching at the University of Washington Medical School?

A. About four or five years.

Q. And during your practice have you had occasion to see and examine Shaun Maloney, the plaintiff in this case? A. Yes.

Q. When did you first see him, doctor?

A. On December 28, 1953.

Q. What did your examination show, if anything, Doctor?

A. He told me that he had been hurt six months previously on June 28, 1953. He was a longshoreman aboard a vessel and he stated that he slipped on some wheat apparently and in order to catch himself—or, he caught himself on his wrist and in so doing he hyperextended or bent his wrist

(Testimony of Dr. Bernard Gray.)

backward rather forcefully He said that he had immediate pain and his wrist became very painful and swollen by the next day. He consulted his doctor, Dr. Smith, who put him on treatment at that time.

Q. That is, Dr. Smith was the company doctor?

A. I don't know if Dr. Smith is the company doctor or not.

Mr. Holland: Well, counsel, will you agree when you say company you mean the stevedore company and not the Johnson Line?

Mr. Poth: The carrier.

The Court: There is no testimony here on that point. The doctor just stated that the plaintiff had consulted his own doctor. That is the [18] testimony of the witness.

Mr. Holland: Yes. I didn't like the implication he was our company's doctor.

The Court: I am not going to be influenced by implications, I hope. Not such slight ones, anyway.

A. At any rate, he was referred to Dr. Smith who treated him. He had some physical therapy. He had no time loss and he states that he favored his wrist for a couple of months and it tended to improve for a while and then got worse. He said he had never hurt his wrist before. He was right handed. At the time I first saw him I noted that as far as examination was concerned, there was ten degrees limitation of motion forward and backward at the wrist. That the grasping power of the hand was

(Testimony of Dr. Bernard Gray.)

weak and there was some swelling at the top of the wrist and the circumference of the wrist was three-eighths of an inch greater than the left. I made some X-rays at the time which revealed nothing significant. I advised that he wear a leather cuff, a so-called Colles cuff, which would immobilize the wrist and take the load off of it. I suggested he come back and see me in about ten days and that was the last I saw of him until a few days ago.

Q. What did you find on this second examination?

A. I saw him August 1, 1955. He told me that after I had seen him he had been seen again by his doctor who immobilized the wrist in plaster for a few weeks and advised surgery to the wrist. He was then sent to [19] Dr. Morris Dirstine who examined him and recommended X-ray treatment and applied the cuff which had been recommended. At that time he was off work for an interval. X-ray treatment did not contribute much to his relief. He had been working since that time, most of the time doing lighter work. At the time I saw him he was driving a bull. If his work would tend to be heavy he wore his cuff. He had certain residual complaints with reference to the right wrist. He had pain in lifting, especially if the hand was in hyperextension, with the wrist bent backwards. Any exertion caused pain and tended to persist for variable lengths of time. The swelling or lump he had at the back of the right wrist would blow up at times and

(Testimony of Dr. Bernard Gray.)

quieten down at times, but there always was some swelling there and the only relief he could get was if he did not exercise his wrist or if he wore his cuff. At the time I examined him I thought that the range of motion was the same as before. There was some limitation of motion, ten degrees, which can be estimated as equivalent to about fifteen per cent. There was a small ganglion or lump at the back of the right wrist which was tender and which could be made to enlarge by bending the hand down. There was slight weakness of grip in the hand, but this was not marked. There was pain on forced motion of the wrist. That is about the extent of the findings on examination. I took new X-rays which showed no change and nothing significant.

Q. What is the prognosis, Doctor, of this condition? [20]

A. Oh, I think that he has got a stationary condition, or, the basis of the condition is stationary. I think that with over-exertion he will have aggravation. I think he will probably end up having surgery on this wrist and an attempt made to remove this ganglion.

Q. You do definitely find a ganglion present, Doctor, is that right?

A. Yes. If removal of the ganglion is successful I think he will have some improvement. If it is not successful, or if it will recur, his condition will be the same. I think the stiffness of the wrist, whatever degree of limitation of motion he has, will be permanent, whether the ganglion is removed or

(Testimony of Dr. Bernard Gray.)

not. I think if he did light work for a long period of time the tendency would be that he would feel pretty good, but when he went back to heavy work he would have some trouble in his wrist again.

Q. Now, Doctor, I may be using the wrong word, but what is the etiology of this ganglion?

A. This is the cause of the ganglion. These things are due to injury or strain. It does not have to be an acute injury. Most commonly what happens is that there is degeneration in the ligaments that connect the small bones together and a fluid is formed and a cyst is formed. At times a ganglion is due to a pouching out of the joint into the tissue. A little defect develops in the ligament between the bones and through that defect increased fluid within the joint pouches the joint lining out and you get a true cyst. Something like a tire before it [21] blows out. That sort of ballooning. Some of these ganglions are lined by the same lining that lines the joint. Occasionally a ganglion is a pouching out of the lining of a tendon sheath that passes over the wrist. These tissues are all relatively the same types of tissues, but there is—a lining that tends to be irritated tends to pour out fluid and with increased exertion they usually get larger and with rest they often get smaller.

Q. On a permanent basis are you able to evaluate his condition at this time?

A. I don't follow your question, sir.

Q. Well, as to a degree of disability, if any?

(Testimony of Dr. Bernard Gray.)

A. Oh, I think the function of his right wrist has been limited and will be limited. If I was going to estimate the degree of permanent disability, I would estimate it at between fifteen and twenty per cent of the loss of the hand at the wrist.

Q. Have you formed any opinion, doctor, as to whether or not the condition that you found and described in his wrist is related to the injury which he sustained when he fell upon his wrist in the hold of that ship?

A. Well, from my history and my examination I believe that the present condition is the result of his injury.

Mr. Poth: I have no further questions.

Cross-Examination

By Mr. Holland:

Q. Doctor, was there any evidence of the ganglion at the time of your first examination? [22]

A. At the time I first saw him I noted swelling over the top of the wrist. The swelling was diffuse.

Q. Did it present substantially the same objective picture as what you saw on the second examination?

A. No. At the time of the examination the swelling was localized and I could demonstrate a ganglion.

Q. In other words, when he first came in there was swelling around the ganglion, is that what you mean?

A. There was enough swelling I couldn't demonstrate a localized bumb or local lump.

(Testimony of Dr. Bernard Gray.)

Q. The swelling was over a larger area?

A. Yes, over the back of the wrist.

Q. Who referred Mr. Maloney to you, Doctor?

A. Mr. Poth.

Q. Do you know any reason why Mr. Maloney did not come back in ten days, but waited almost two years before he came back to you?

A. I understand that the company had referred him on.

The Court: What was the answer, Doctor?

The Witness: I understand the company referred him on to Dr. Dirstine.

Q. What was the purpose of Mr. Maloney calling upon you three days ago? Was that for examination and treatment or what was it? Was it for the purposes of this trial?

A. Well, as a matter of fact I have never reported my findings to Mr. Poth or anybody else in this case. My records shows that Mr. Poth referred Mr. Maloney and he apparently wanted to come to me for treatment and when I saw him on August 1st he came in to have [23] his condition checked and I didn't know—I might have known that day or the next, he was coming to trial so I assume the purpose was for the trial, but this is the first report I have ever made to Mr. Poth or anybody else on Mr. Maloney's condition.

Mr. Holland: I have no further questions.

Mr. Poth: That is all.

(Witness Excused.)

The Court: We will take a recess for ten minutes.

(Recess taken.)

SHAUN MALONEY

resumed the witness stand.

Direct Examination
(Continued)

By Mr. Poth:

Q. Have these complains that you just related in any way affected your ability to work?

A. Yes.

Q. How has that been accomplished?

A. Well, I—if I have a job that hurts the arm, the wrist and the arm, I sometimes lay off one, two, three, four days at a time until this swelling subsides and my arm feels normal, as near normal as it can be under the circumstances.

Q. Have you kept any record of your loss of earnings?

A. Yes, I have somewhat of a record of how much time I have been off the job, how much I have worked.

Q. Was this something started since the injury or do you [24] normally keep a record of your earnings?

A. Well, I normally keep a kind of report, but I had one since 1953. I had some cards I used to keep and I just reduced it into one consecutive form.

Q. Do you have an independent recollection of

(Testimony of Shaun Maloney.)

the time that you have lost and your earnings? That is, prior to the time you were injured and after the time of the injury? Do you have an independent recollection of the dates and times and amounts, other than those records that you have?

A. Well, as I understand the question, I recently calculated the loss of time to be 184 days.

Q. How much did that represent in money?

A. Off hand, based on my 1953 earnings, it would represent around $2300, I think, off hand.

Q. That you have lost to date on account of this.

A. That is right.

The Court: How much is that?

The Witness: Approximately $2300.

Q. Does your wrist seem to be improving of late?

A. I don't thing there is much improvement. I have been able to work by picking my jobs and because of recent shipments out of this port I was able to drive bull quite a bit, so I worked more than I think I would have as a stevedore.

The Court: Doing what?

The Witness: Driving bull.

The Court: What does that mean?

The Witness: A small little truck [25] that is used to lift loads.

Q. This longshoring work that you do, is that steady work inasmuch as you go to work at the same place every day for the same employer?

A. Well, generally we work for the Waterfront Employers but the make-up of the Waterfront Em-

(Testimony of Shaun Maloney.)
ployers is several independent stevedoring contractors and steamship companies and we may work for one one day and for an entire week or we may work for two or three of those independent contractors or steamship companies in the course of a week.

Q. I believe you mentioned something about picking jobs. How is that accomplished?

A. Well, in the hiring hall where we are dispatched you are sometimes able to plug in for a job that you know to be an easier job than some of the other jobs and by watching the board and if you are lucky enough, you can probably pick a job that isn't as hard as some of the other work.

Q. What happens if the jobs all happen to be hard jobs on a particular morning?

A. Well, then as a matter of experience I generally don't peg in to go to work that day.

Q. How are the men selected? Is it on a rotation basis or just how is it?

A. The men are selected on a rotation basis. We have a board with every man's name in a consecutive manner, in a series of rows. When you wish to go to work you put your peg in the hole opposite your name and as the ships are dispatched the next man up [26] gets the next job up if he wants it or if he can handle it.

Q. Well, if he turns the job down, does he immediately get the choice of another job?

A. No, then he has to wait until all the other men have a choice of a job and then if enough work

(Testimony of Shaun Maloney.)

is available and the peg comes back to him he has a second choice, if there is enough work to go around to go that far. Some days there is and some days there is not.

The Court: In other words, if you did not accept the job you would have to wait until all the available men had their opportunity or turn.

The Witness: That is right, your Honor. Then if still more men were needed on another job you could handle your peg in for that.

Mr. Poth. I believe I have no further questions at this time.

The Court: I would like to know what the condition of the lighting was as you found it when you went down into that hatch?

The Witness: On this particular day the lighting condition I would say would be fair to good. It was natural light. We had only two sections of the hatch open. I imagine there was about thirty per cent of the hatch open and the lighting condition was fair to good. It was daylight and it would have been possible—we worked that day without any artificial lights.

The Court: That is all I have. [27]

(Testimony of Shaun Maloney.)

Cross-Examination

By Mr. Holland:

Q. Mr. Maloney, I wonder if we can get a better picture of the area in which you were working. How much distance between the deck on which you fell and the overhead or ceiling above, approximately?

A. Well, I would estimate that height between the level of the 'tween deck on which we worked, and that I think you are referring to, the deck head, at about fifteen feet.

Q. In other words, that would be the distance, approximately, that you climbed down the ladder, is that right?

A. No. There is a coaming which is an additional—well, it would be in shoreside people's language kind of a wall, the coaming on these ships is quit high and that would be four or five feet, three or four feet, anyway, so it is closer to twenty feet the length of the ladder.

Q. That you climbed down?

A. I would estimate it to be that.

Q. In speaking of two sections of the hatch being removed. What would be the dimension of that area?

A. Well, the hatch, I assume, would be twenty or twenty-two feet for ships, that is across and——

The Court: How many feet?

The Witness: Twenty or twenty-two feet.

A. And we had, as I recall, two sections off and

(Testimony of Shaun Maloney.)

these were hatchboards and they were planks, would be considered a plank, and around eight to ten foot long. [28] We had probably fifteen to twenty, somewhere in that neighborhood, fifteen or twenty feet opened on the hatch.

Q. So as you looked up from the spot you fell you would see an opening——

A. 15x20, something in that nature. I had no occasion to measure it, but I would judge from my experience on ships it was that.

Q. Which direction were you walking when you fell?

A. I was headed in a forward direction on the ship.

Q. You were out about a couple of steps?

A. A couple of steps from the ladder.

Q. And would you be roughly in the center, then, underneath the center of the opening that you described? A. Yes, on the after end.

Q. In looking up from that point it was plain daylight, was it? A. Yes.

Q. Had you ever been down in that hatch before?

A. No, not on that trip in. I think I worked the ship before, but not on that trip.

Q. At least this morning this was your first time down? A. Yes.

Q. You were the first man down?

A. I was the first man down.

Q. You had no knowledge of any condition until you found it after you slipped and fell, did you?

(Testimony of Shaun Maloney.)

A. I had no knowledge of any unsafe condition.

Q. As to the wheat that was on the deck in the area where you fell. Would you say that there was a [29] small amount of it or a great amount of it?

A. Not a great amount. It was a sprinkling of wheat kernels.

Q. And was it mostly the dust that caused you to fall or the wheat kernels?

A. I lay it to the dust mostly.

Q. Is it the dust that was slippery? In other words, normal dust that I have seen would not be slippery. I presume wheat is different?

A. It seems to be. There was a coating of heavy dust all over the hatch and there was a sprinkling of this wheat in it and I lay the cause of the slipperiness to the dust that was on the hatchboards.

Q. Did you tell us you couldn't recall if the feeder box was at the level of the 'tween deck or a little above it?

A. I don't believe I said anything about the feeder box.

Q. Maybe it was the other witness. Did you describe the feeder box for us?

A. I didn't hear you.

Q. Will you describe the feeder box for us?

A. Well, the feeder boxes are built in different ships in different manners.

Q. Tell us about this one?

A. As I recall this one, this was a feeder box that was built the entire width of the hatch in the forward section of the hatch and extending back

(Testimony of Shaun Maloney.)
some distance from the forward end of the hatch. I believe it extended well up to the coaming.

Q. That is at the main deck?

A. Well, it wouldn't go up to the main deck. It would [30] go just about to the main deck, I mean, the sides they hold it up.

Q. If you are standing by it, it would go above your head some feet.

A. As I recall, this one extended above our heads. Sometimes they don't go all the way. It depends on how much of the cargo is needed for the feeder.

Q. The feeder box, just for the sake of clarity, is in the nature of a funnel that goes through the 'tween deck and permits you to put grain in at the top and it goes through the 'tween deck into the lower hold, is that about right?

A. Well, I don't know as I understand you. My conception and understanding of the feeder boxes are when the lower holds of a ship are filled with grain there is a certain percentage of the cubic content of that cargo that is calculated will settle and the settling of grain or bulk cargoes in a ship is not a safe thing when you are at sea in heavy weather, so they have this box which is constructed to take care of a certain amount of wheat so as the grain settles this will fall down and keep the grain from shifting to side to side if you encounter heavy seas. That is the purpose of the feeder box in the general language.

Q. As you stand in the 'tween deck and look at

(Testimony of Shaun Maloney.)

this particular box it would look like a rectangular, walled thing that you could walk up to and touch and it would be above your head a little distance.

A. Yes, it would be rectangular and I think it would be above our heads in this particular [31] case.

Q. Do you know whether any grain was in it at that time or do you know?

A. I didn't look into the feeder box, but I would assume there was grain in there because when you pour wheat into a ship or any bulk grain cargo they have a certain amount of it that you can see. There is evidence of it. They shoot it in and some of it slips out through cracks and spills and things like that.

Q. That is out through cracks in the box itself, you mean?

A. No, the box itself is practically all instances quite tight, but when they load the ship the chute that pours it has a certain drive to it and it flies around because when you pour ships you don't—it is quite a bit of a job, it is a dusty operation and you can't always see and you hit it and it kind of flares up and goes over the tops, sometimes.

Q. Is the box constructed of wood?

A. The boxes are constructed of wood and the cracks inside the feeder box are generally lined with burlap or paper to prevent the drying out of the wood as the ship is in transit and the wheat coming out all over.

(Testimony of Shaun Maloney.)

Q. Did you continue working the balance of that ship? A. Yes, I did.

Q. Was Dr. Smith the first doctor that you went to? A. Yes.

Q. And you went to him because you were sent by the stevedore company? [32]

A. I was sent to him by the Grace Company who are agents for the John Line of Sweden, the owners of the ship.

Q. The Grace Company. Do you know if they were doing the stevedoring?

A. I don't know whether W. R. Grace or Grace Line. There are two companies. It was Grace that sent me to Dr. Smith.

The Court: Dr. Smith?

The Witness: Dr. Smith, your Honor.

Q. And aside from your working for the Waterfront Employers, which is normal on the waterfront, the stevedoring company which was actually doing the job was that W. R. Grace, if you know?

A. I think it was W. R. Grace.

Q. How many times did you go back to Dr. Smith for examination or treatment?

A. When I first went to Dr. Smith he took some X-rays and told me I had suffered a sprain and that it would eliminate itself. It would be painful but he saw no reason why I should stop working and he told me that I should come to his office two or three times a week for physical therapy treatments and between June 28th and December 28th or 29th, about that time, I had been to his office on several oc-

(Testimony of Shaun Maloney.)

casions, sometimes two and three times a week, and he has taken several X-rays in the period between June and the latter part of December, of my hand.

Q. During that period did you go to any other doctor? A. No. sir. [33]

Q. Then on December 28th, Dr. Gray told us you went up to see him. A. I did.

Q. Who was the next doctor that you saw after Dr. Gray?

A. I went to Dr. Dirstine, Morris Dirstine.

Q. And did you go to him on your own or did somebody send you?

A. No. About December 28th I finally couldn't stand the pain of the arm any more, working and I went to Dr. Smith and he told me——

Q. Just a moment. We can't tell what other people said. My question was, how did you happen to go to Dr. Dirstine, did you go on your own?

A. I wanted a choice——

Q. The question is, did you go on your own or did somebody send you?

A. The insurance company, the carrier carrying the insurance sent me.

Q. For the longshoremen? A. Yes.

Q. He was the next doctor you went to?

A. Yes sir.

Q. What other doctors have you been to other than the ones you have mentioned?

A. I went to Dr. Gray, to Dr. Smith and to Dr. Seering.

Q. When did you go to Dr. Seering?

(Testimony of Shaun Maloney.)

A. That was last—I think January, sometime.

Q. Of 1955? A. 1955.

Q. And did you go on your own or did somebody send you? [34]

A. I went to Dr. Seering on my own.

Q. Did he treat you or just examine you?

A. He examined me.

Q. Did you go just the one time to him?

A. I think I was there twice.

Q. And both for examination only?

A. Well, once I think I went up for observation. He made an examination one time. I also went to Dr. McConville.

Q. That was at our request?

A. At the request of Bogle, Bogle & Gates, and the insurance company.

Q. Any other doctor you have been to?

A. No sir.

Q. When you told us, Mr. Maloney, that you have lost about 184 days. What period is that? Is that from the time of the accident up to today?

A. That is the time of the accident up until today.

Q. Do you have available there your earnings for the various years? A. I do.

Q. Could you tell us what your earnings were for 1953? A. I could consult a slip I have.

Q. You have your own notes that you keep?

A. I made some, yes.

Q. Could you tell us what 1953 was?

(Testimony of Shaun Maloney.)

A. In the year 1953, I made a total sum of $4,663.28.

Q. Do you have the records for 1952?

A. I do.

Q. What was that? A. $2,383.32. [35]

Q. And in 1954?

A. 1954, I made $2,988.32.

The Court: Let me have that figure again?

The Witness: 1954, $2,988.32.

Q. Was there any time during 1954 that you were off work because of physical trouble other than your hand? A. Yes.

Q. And how long were you off work for that reason?

A. I injured my ankle, I sprained my ankle September 18, 1954, and I returned to work, I believe, December 6, 1954.

The Court: Those dates again?

The Witness: September 18, 1954, I think that was the date, and I returned December 6, 1954.

Q. Do you have your earnings to date for 1955?

A. Not to date, I have approximate.

Q. What is that?

A. I will have to give it to you in two groups. We were furnished with a report of our earnings on this only by hours. On the 13th of June I had worked a total of 437 straight-time hours and 382 overtime hours. That is a total of 819 hours and to the best of my knowledge, I would say I have worked about 160 hours in addition to that, about one thousand hours.

(Testimony of Shaun Maloney.)

Q. Could you just give us a rough estimate of how much money you have earned?

A. I would make an estimate that that would run between $2,700 and $2,800 for a total of approximately one [36] thousand hours. Maybe a little more.

Q. Up to today? A. Up to today.

Q. Were you off work at any time this year because of any reason at all other than what you might have told us about your hand?

A. Yes. One day a rail, a stanchion rolled on my foot and I lost six or seven days on that account.

Q. Any other period of lost time from work?

A. No, I don't think so.

Q. In computing the days that you gave us as being those that you have lost since the time of your injury, how did you determine what days you might have worked if you had not had your hand injury. In other words, what work was available to you? How do you figure that out?

A. The way I determined I was unable to work on account of the injury is when I was on a job and when I finished it or had to check out I was unable to continue work for a few days or a day or two or three, or whatever the case may be, because of the soreness and stiffness in my wrist and in my arm.

Q. Was any part of that 184 days that you listed also part of the time you were off because of your ankle injury?

A. No, none of that time is computed. Only the

(Testimony of Shaun Maloney.)
days I was actually—that I determined I was laid up as a result of my wrist.

Mr. Holland: I have no further questions. [37]

Redirect Examination

By Mr. Poth:

Q. How much did you say you made in 1952?

A. $2,383.32.

Q. What was you employment in 1952?

A. In 1952 I was not a fully registered longshoreman.

Q. What do you mean by a fully registered longshoreman?

A. Well, they have in this port an agreement by all the employers on how many men are to be registered fully. They have others who are agreed upon as to being partially registered men.

Q. This board you mentioned you are on where you put your plug in and it goes in rotation. What kind of men are on that board?

A. Those are all the fully registered longshoremen on the basis of seniority.

Q. Were you on that board in '52?

A. I was not. I was on the temporary board that they have, the temporary labor pool board.

Q. You took the work left over after those men went to work? A. Yes.

Q. Was your job opportunity as good in '52 and in '53? A. No sir.

Q. Why was that?

A. Well, first, the regular longshoremen get the

(Testimony of Shaun Maloney.)

first—the fully registered men on the basis of seniority get the first chance at the job. Any work left over comes to the temporary pool or the partially registered men. [38]

Q. How do you get on that registered board?

A. By the basis of seniority in the industry.

Q. When did you get on the fully registered board? A. In April of 1953.

Mr. Poth: I have no further questions.

Mr. Holland: I have no further questions.

(Witness Excused.)

The Court: We will take our recess now until 2 o'clock this afternoon.

(Recess taken.)

Afternoon Session

August 3, 1955—2:00 P.M.

The court reconvened, pursuant to adjournment, at 2:00 p.m. this date. All parties present.

Mr. Poth: The plaintiff will rest at this time, your Honor.

(Challenge as to the sufficiency of the evidence made by the defendant.)

The Court: The motion is denied.

WILLIAM DIBBLE

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Holland:

Q. Would you state your name? [39]

A. William Dibble.

Q. Where do you live? A. Seattle.

Q. What is your occupation?

A. Supercargo.

Q. Mr. Dibble, what is a supercargo?

A. A supercargo supervises the loading and/or discharging of ships.

Q. And for whom does the supercargo normally do that work? A. For the ship or agents.

Q. Mr. Dibble, did you ever do any work aboard the Golden State?

A. Not the Golden State.

The Golden Gate. A. Yes, sir.

Q. The subject of this lawsuit is an incident that occurred on June 28, 1953. Would you state whether or not you were aboard her in any capacity on that date? A. I was supercargo on that date.

Q. And just generally what do you do aboard the vessel as you were doing your work as a supercargo?

A. I don't know just what you mean by that.

Q. What do you do when you are on the ship? What does your job require you to do?

A. Usually give instructions to the foreman and then I look around and see that things are done as it should be.

(Testimony of William Dibble.)

Q. Will you state whether or not on that date any [40] complaint was ever made to you that the 'tween deck level of the Number 7 hatch on the vessel was dirty, or covered with grain or wheat?

A. No, sir.

Q. And would you state whether or not in your recollection you have any memory of any work being done in the 'tween deck level of Number 7 hatch of cleaning up any debris or wheat or anything?

A. Not in Seattle.

Q. Do you have any recollection of looking down in that particular hatch when you were on the Golden Gate? A. No, sir.

Q. Have you been on other vessels, Mr. Dibble, on which wheat was a part of the cargo?

A. Yes, sir.

Q. And have you observed other vessels in which there have been a feeder box between decks?

A. Yes.

Q. Assuming, Mr. Dibble, that the lower hold was full of wheat and the feeder box in the 'tween deck level was full of wheat, what have you in your experience observed as to the presence or absence of any wheat in the vicinity of the feeder box after the vessel has been loaded with its cargo?

A. Well, there is always a certain amount that spills over, of course, when they are pouring the wheat. They clean up the decks as best they can and all of the wheat is put into the hold where it is supposed to be. Occasionally there is a little wheat slops over, gets on the decks. [41]

(Testimony of William Dibble.)

Q. You told us in answer to my question that you had not observed any cleaning of the deck in Seattle. Did you imply by that you had seen some elsewhere?

A. Yes, they cleaned up in Tacoma where they loaded it. That is part of the longshoreman's work to clean up the deck and throw what wheat slops over back.

Q. Were you supercargo on the vessel for that Tacoma job? A. Yes, sir.

Mr. Holland: I have no further questions.

Cross-Examination

By Mr. Poth:

Q. Did you see anybody cleaning the deck in the Number 7 hold in Tacoma?

A. I don't recollect right now.

In other words then, you are just testifying that you think maybe they did clean it.

A. That is the standard procedure. I know they cleaned it, but I don't recollect actually seeing them do it.

Q. You don't know how well it was cleaned?

A. No, sir.

Q. Tacoma would be the port where the wheat was loaded prior to the time the vessel came here to Seattle on June 28, 1953? A. Yes, sir.

Q. And you also don't recall much about the Number 7 hold when it was in Seattle, do you?

A. No, sir.

Q. You don't even remember ever looking down

(Testimony of William Dibble.)

there, do you? [42] A. Not particularly.

Mr. Poth: I have no further questions.

Redirect Examination

By Mr. Holland:

Mr. Dibble, when you stated that in connection with the loading in Tacoma, the cleaning in Tacoma you did not actually see it being done. How can you conclude that it had been done?

A. That is the standard practice and the foremen are instructed to see that that work is done. I may have looked at it, but I don't recollect that I did. There is nothing special that I should remember.

Q. Were you on the vessel in Tacoma?

A. Yes, sir.

Mr. Holland: No further questions.

Mr. Poth: I have nothing further.

(Witness Excused.)

Mr. Holland: Mr. Patterson.

WILLIAM PATTERSON

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Holland:

Q. Would you state your name?

A. William Patterson.

Q. What is your occupation?

(Testimony of William Patterson.)

A. I am stevedore foreman.

Q. Where do you live? [43]

A. 2930 South 18th, Tacoma, Washington.

Q. As a stevedore foreman by whom are you normally employed? A. Grace Line Steamship.

Q. Were you present at any time aboard the vessel Golden Gate on June 28, 1953? A. Yes.

Q. What was your job aboard her?

A. I was head foreman.

The Court: I would like to ask a question at this point. The gentleman testified he was employed by Grace Line Steamship. Is that the same company mentioned in paragraph IV of the complaint, the W. R. Grace Company?

The Witness: They are agents for them.

The Court: The point is, if there is any variance I want to know if there is going to be any point made of it.

Mr. Holland: Perhaps I could explain and counsel can correct me if I am not correct. I think W. R. Grace & Company does stevedoring operation and they were the stevedoring contractor for this particular job and were in effect the plaintiff's employer. I think at the same time they also act in another capacity as local agent for the Johnson Line, which is a foreign corporation and therefore acted as agent and stevedoring contractor.

The Court: If there was technically any variance, you make no point of that.

Mr. Holland: There is no point of that, [44] your Honor.

(Testimony of William Patterson.)

Q. As stevedore foreman, Mr. Patterson, just generally what are your duties on a job such as you were doing that day?

A. In charge of all loading and discharging operations.

Q. Do you recall having heard of an accident to Mr. Shaun Maloney aboard the vessel on that date?

A. Yes, he reported to me on that date he slipped and fell.

Q. Will you state whether or not at the time he reported to you it was done in the normal course of your longshoreman's business of reporting accidents?

A. Yes. I am hazy on the time. I believe it was around lunch time or right after that. I wouldn't want to get down and state right exactly, but that is my recollection.

Q. As stevedore foreman, were you his superior officer, so to speak? A. Yes.

Q. Would you tell us whether or not at the time of his reporting his accident to you he made any complaint about the condition of the 'tween deck in the Number 7 hatch?

A. Well, I am kind of hazy on that, it is two years back, and I am not too positively sure. He did report the accident to me. I believe he said he slipped. I think he said there might have been wheat. I don't remember exactly what he fell on.

Q. Do you recall anybody else making complaints about the condition of that area of the ship? [45]

(Testimony of William Patterson.)

A. No, I don't.

Q. Do you recall having ordered or having observed any cleaning up of the 'tween deck of the Number 7 hatch?

A. No, I don't remember that.

Q. In the normal course of a stevedore or longshoreman's work, Mr. Patterson, what is done by a longshore gang if they come to an area which in their opinion is dirty and should be cleaned up for their work? A. Should be cleaned up.

Q. Who does that?

A. The longshoreman as a rule if it is only a small operation. If it is a big, major operation, then the crew of the ship would probably do it.

Q. Tell whether or not you observed any of the ships crew cleaning that up?

A. No, that particular time I was engaged in unloading heavy lift tanks on another hatch and I was practically engaged there on that particular hatch all the time.

Hr. Holland: I have no further questions.

Cross-Examination

By Mr. Poth:

Q. Who normally is charged in your experience with the duty of keeping the decks of a vessel clean? Your company or the ship?

A. The ship's personnel keeps their decks clear, as a rule.

Mr. Poth: I have no further questions.

(Witness Excused.) [46]

Mr. Holland: Defendant wishes to publish the deposition of Dr. M. J. Dirstine.

(Deposition of Dr. M. J. Dirstine, taken July 12, 1955, at Seattle, Washington, at the instance of the defendant, was opened, published and read as follows):

"DR. M. J. DIRSTINE

a witness called on behalf of the defendant, being of lawful age, and being first duly sworn in the above cause, testified on his oath as follows:

Direct Examination

By Mr. Franklin:

Q. Would you state your name, please?

A. M. J. Dirstine.

Q. You are a duly licensed practicing physician in the State of Washington, Doctor?

A. That is right.

Q. Of what medical school are you a graduate?

A. Northwestern.

Q. When did you graduate? A. 1937.

Q. Would you briefly sketch your professional career following graduation?

A. I had an internship and surgical residency and pathologic residency.

Q. Do you specialize in any particular field, Doctor?

A. Well, my practice is limited to surgery of the hand.

Q. How long have you limited yourself to that

(Deposition of Dr. M. J. Dirstine.)

specialty? A. Let's see, for about ten years.

Q. And what scientific societies are you a member of, [47] Doctor?

A. King County, Washington State Medical, Seattle Surgical, American Medical Association, American College of Surgeons, American Society for Surgery of the Hand. That is enough.

Q. Doctor, will you be in Seattle the week of August 2, 1955, when the case of Maloney verson Johnson Line comes on for trial?

A. I don't plan on it.

Q. You expect to be out of town? A. Yes.

Q. And you therefore waive signing your deposition? A. Yes.

Q. Have you ever had occasion to treat the plaintiff in this action, Mr. Shaun Maloney?

A. The only treatment I have done or suggested has been that I recommended two or three X-ray treatments which was done by a radiologist.

Q. When did you first see Mr. Shaun Maloney, Doctor? A. On the 11th of January, 1954.

Q. And at that time, Doctor, did you see him in connection with an injury he had sustained earlier?

A. Yes, he stated that he was injured in June, 1953.

Q. And briefly, what was the nature of the injury he told you he sustained?

A. He was working on the Steamship Golden Gate at a Seattle dock and he slipped on the deck and fell on his right hand and fingers.

Q. Was he making any complaints to you on

(Deposition of Dr. M. J. Dirstine.)
January 11, 1954, in connection with that injury when you first saw him? [48]

A. His complaint then was pain in the dorsal surface of the right wrist when doing heavy work. He also stated that after doing heavy work he gets a lump on the back of the right wrist.

Q. Is there a medical or technical name for this lump he described, Doctor?

A. Well, after watching him——

Q. No, I mean generally is there a medical description for the lump?

A. A tumor.

Q. Do you call it a ganglion?

A. Yes, that is a tumor.

Q. Doctor, at the time that you first examined Mr. Maloney on January 11, 1954, did you make a physical examination of his right wrist?

A. Yes—well, right upper extremity.

Q. What did that show with reference to the presence or absence of any unusual condition?

A. Well, at that time he complained of discomfort in the wrist but there was no swelling of the hand or wrist at that time and he had complete range of all motions of the wrist and fingers and there was no evidence of any nerve changes. In fact, objectively there wasn't any findings.

Q. What did you do, Doctor, in connection with treating Mr. Maloney?

A. I think at that time I recommended if there was any possibility of a ganglion, although objec-

(Deposition of Dr. M. J. Dirstine.)
tively and clinically there wasn't any evidence of one, that he should have X-ray therapy. That occasionally helps [49] a patient like this. Also that the wrist should be immobilized in a splint.

Q. When did you next see Mr. Maloney?

A. The 22nd of January.

Q. What was his condition at that time?

A. It was about the same, but he still had the same complaints as far as I recall and at that time we ordered X-ray therapy.

Q. When did you next see him?

A. On the 27th.

Q. Of January? A. That is right.

Q. What was his condition at that time and what did you do for him?

A. At that time when he came in we had ordered his splint and he had the splint and he had had his X-ray therapy and he still complained of some soreness in the wrist, although there was no objective findings at that time, either, and at that time we gave him a prescription for cortone which sometimes helps complaints of discomfort in the wrist.

Q. Either on January 22 or January 27 was there any evidence of any tumor formation present in the right wrist?

A. I have no mention of any tumor at all here.

Q. When did you next see Mr. Maloney?

A. On the 3rd of February, 1954.

Q. With what results?

A. He then said he had much less discomfort in the wrist and there was very little, if any, swelling that I [50] could see. He was wearing a splint. I

(Deposition of Dr. M. J. Dirstine.)

told him to continue wearing that splint and come back in about another week and we would see how he was doing.

Q. Did he make any comments as to whether or not he had made any progress?

A. The only comments, he told me he had less discomfort.

Q. When did you next see him?

A. On the 15th of February, 1954.

Q. What was his condition at that time?

A. At that time examination revealed no swelling of his wrist but he stated that he was chopping wood and he thought the wrist was a little bit sore and I asked him then to leave the immobilizing splint on for awhile, and at that time he had no evidence of any tumor. He also said he had no discomfort—no, I told him if he had no discomfort then he should return to work.

Q. When did you next see him, Doctor?

A. On the 19th of February.

Q. What was his condition at that time—that is 1954? That is right.

Q. What was his condition at that time?

A. At that time there was still no evidence of any swelling in the wrist and there was no evidence of a ganglion or tumor.

Q. Was he still wearing the splint?

A. Yes, he was wearing the splint, and will return to work on the 23rd of February.

Q. 1954? A. 1954. [51]

Q. When did you next see him, Doctor?

(Deposition of Dr. M. J. Dirstine.)

A. I told him to go to work and try it and come back in two weeks and I saw him on the 2nd of March.

Q. What was his condition on March 2, 1954?

A. He still had no evidence of a ganglion but he still complained of a little soreness in the wrist and he had been wearing this splint intermittently and has returned to work. I asked him to report back if he had any further trouble.

Q. When did you next see him, Doctor?

A. I don't know if I did see him—at that time I sent his report to Mr. Poth on the 2nd of March summarizing the whole thing, and I sent another letter on the 23rd of April and in the letter on the 23rd of April it was just a resume of the examination of the time I saw him on the 2nd of March at which time there was no evidence of any ganglion. He still stated he had some soreness in this area although not as marked as previously. He is working and wearing a splint intermittently.

Q. When did you next see him, Doctor?

A. On the 21st of August, 1954—no, a correction on that, I saw him on the 17th of August and I sent this letter on the 21st of August and he still stated he has some discomfort in the wrist especially on hyper-extending it and lifting objects over his head. He has been wearing the splint intermittently and he has been able to carry on his occupation but with some discomfort. This patient still has no evidence of tumor formation. He has complete range of all motions of the wrist although he states after heavy

(Deposition of Dr. M. J. Dirstine.)

work it [52] becomes sore and he cannot completely extend it.

Q. And then when did you next see him?

A. That is the last time, I think.

Q. I beg your pardon?

A. Let's see—wait a minute. This patient was in this office on the 30th of September, 1954, at which time he stated he had been off work since the 18th of September because of an ankle injury and since he has not been working he has had no discomfort in the wrist. Examination at that time revealed complete range of all motions of the wrist and no evidence of tumor formation and no swelling, no evidence of inflammatory reaction.

Q. Doctor, based on your examination of September 30, 1954, was there any objective evidence that Mr. Maloney had sustained any permanent disability as a result of his accident of June 28, 1953?

A. Well, I could see no objective findings nor any disability. He had no swelling, no tumor formation. He had good range of motion, no inflammatory reaction, and the overall picture, his hand and wrist looked normal.

Q. Doctor, taking into consideration Mr. Maloney's injury occurred June 28, 1953, if a tumor were to have resulted from that injury what is your professional opinion as to when it would reasonably be expected to appear or manifest itself following that injury of June 28th, 1953?

A. Well, I am not sure that the tumor we are speaking of, the ganglion, is due to injury. [53]

(Deposition of Dr. M. J. Dirstine.)

Q. No, just for the sake of discussion assume that the ganglion were due to an injury, if the injury occurred to Mr. Maloney on June 28th, 1953, when would you reasonably expect it to appear following the injury?

A. Well, those we see that have ganglions, most frequently they would say they fell or had an injury maybe two weeks ago or four weeks ago or something like that. They all vary. Quite frequently—I presume more frequently—they have these tumors and they have no history of injury. They just came.

Q. Doctor, is the cause of tumors in the wrist such as we have been discussing known?

A. No.

Mr. Franklin: That is all, thank you, Doctor

Cross-Examination

By Mr. Poth:

Q. Let's see, Doctor, you were employed by the carrier here to treat Mr. Maloney?

A. I think that he was sent in by Travelers Insurance Company.

Q. Have you discussed this case with Mr. Franklin prior to today? A. No, not that I know of.

Q. Have you discussed this case with anyone from Mr. Franklin's office, the firm of Bogle, Bogle & Gates?

A. Not that I know of, no—not that I recall.

Q. Well, have you discussed the case with anyone? A. No, not that I know of, no. [54]

(Deposition of Dr. M. J. Dirstine.)

Q. To whom have you sent communications regarding this case?

A. I think all of these have gone to Mr. Poth and to Travelers Insurance Company.

Q. Doctor, why did you give him the X-ray treatments?

A. Because sometimes some doctors have the idea that X-ray will help some of them or make them recede. That has been tried quite some time and I have tried it.

Q. To make what recede?

A. Any tumor that may be there.

Q. Was there a tumor there?

A. I never saw a tumor there.

Q. Why did you give him the X-ray treatments?

A. Because occasionally I would presume that these tumors could be present and not clinically evident—be small enough—because that was always his story, that he had a tumor there and he had seen a tumor or enlargement.

Q. Do those tumors come and go?

A. That is what I understand.

Q. You are not too familiar with them, Doctor?

A. What do you mean, "too familiar"?

Q. Well, you say that is what you understand. Do you know whether or not they come and go from your own personal experience?

A. Well, all we have to go on is the history and patients will tell you, " I have one on this wrist now and I had one over here three years ago and it [55] is gone."

(Deposition of Dr. M. J. Dirstine.)

Q. Is trauma a factor in the formation of ganglion and tumors? A. No one knows?

Q. No one knows? A. No one.

Q. Doctor, I have in my hand a book from your library which is entitled, "Surgery of the Hand," by Bunnell and I believe it was copyrighted in 1948 by J. Lippincott & Company. Have you read your book? A. I think I have.

Q. Now, referring to page 866 under the section, "Tumors of the hand," and under the subsection entitled "Ganglia," and referring again to page 866 I wonder if you could read into the record, Doctor, that paragraph right here.

A. One or two lines here it states, "In most reported series trauma appears to be a factor in from one-third to one-half of the cases."

Q. When it says that, "series" what is meant by that term?

A. That is a very vague term. Some doctor has reported on these ganglia. Presumably he may have had two cases in his series. He may have had ten or he may have had 20.

Q. In other words then, "series" means reports of series of cases by individual doctors, is that right, is that the definition of "series"?

A. I presume so.

Q. Well, are you sure, Doctor?

A. Well, like I stated, a series, he is reporting on a [56] series of anything.

Q. In this paragraph are they referring to a

(Deposition of Dr. M. J. Dirstine.)

series of ganglion tumors that they have in their practice?

A. I presume so, yes, because it is under the heading of "ganglia."

Q. Well, I would like to be sure. Would you read it over and be sure? A. Read over what?

Q. Read this and be sure the series referred to is reports of series of cases of ganglion tumors.

Mr. Franklin: If the doctor can answer what the doctor had in mind—if he is a mind reader.

A. In this paragraph it doesn't state a series of what.

Q. Well, what series is being referred to?

A. That depends on what your interpretation is.

Q. Well, what is your interpretation, Doctor?

A. I would presume it would be under ganglia because it is under the subhead of ganglia.

Q. In other words, it wouldn't be a series of broken legs they are talking about?

A. Well, I wouldn't presume so.

Q. Well, isn't it a fact, Doctor, that this paragraph refers to a series of studies reported on cases by various specialists in the field of ganglion tumors? A. Not necessarily.

Q. What does it refer to?

A. It doesn't say anything about the series referring to any group of specialists in the field.

Q. Well, just tell what "reported series" means here, to [57] the best of your ability?

Mr. Franklin: The doctor has already told you what it is.

(Deposition of Dr. M. J. Dirstine.)

A. I just said it could be a series I would presume, since it is under the subhead of "ganglia" that it was a series of ganglia, but the series could be two, three, four, ten or 20. Also you asked if the series reported by specialists——

Q. Well, "reported series"—what do you think the author is referring to when he says "reported series"? A. I do not know.

Q. Well, Doctor, would you assume that this would be a reported series of cases that have come to the attention of physicians and surgeons who have made reports on the findings in their cases of ganglion tumors—would that be the natural assumption here, Doctor?

A. It is probably reports that have been gleaned from the literature of doctors who have made some reports on their experience with ganglia.

Q. All right, and this author says in your book that from one-third to one-half of the cases trauma appears to be a factor.

A. That is what it states there.

Q. Is that your opinion? A. No.

Q. What is your opinion, Doctor?

A. That is his opinion. That is not my opinion.

Q. You have a different opinion then than your book? A. That is right.

Q. What is your opinion, Doctor? [58]

A. I don't think trauma plays a part and in this patient here I don't think he has a ganglion.

Q. Well, we are discussing it generally, Doctor.

(Deposition of Dr. M. J. Dirstine.)

In what percentage does trauma play a part, in your opinion?

A. No one knows. I don't know. I think it is a very small percentage if at all.

Q. Who is Sterling Bunnell, M.D.?

A. A surgeon in San Francisco.

Q. Is he an honorary member of the American Academy of Orthopedic Surgeons, member of the American Surgical Association, American Association of Plastic Surgeons, American Society of Plastic Reconstructive Surgery, American Association of Surgery of Trauma, American Society for Surgery of the Hand, Consultant in Hand Surgery to the Surgeon General, Licentiate of the American Board of General Surgery and Plastic Surgery, Corresponding member of the British Orthopedic Association? A. I don't know.

Q. You don't know?

A. You are reading it there.

Q. Does that appear in your book?

A. I presume it does if you read it from the book.

Q. How did you happen to buy this book, Doctor? A. It is a good reference book.

Q. Do you use it quite often for reference?

A. Oh, I don't use it quite often.

Q. But you don't believe what is in it?

A. I didn't state that. [59]

Q. But you don't believe what is in it on ganglia? A. I didn't state that.

(Deposition of Dr. M. J. Dirstine.)

Q. You don't believe that trauma appears to be a factor in from one-third to one-half of the cases?

A. I would like to bring to your attention, if I may, on that thing, that you quoted Sterling Bunnell. Did Sterling Bunnell write this chapter on tumors of the hand?

Q. I don't know. Who did write it, Doctor?

A. No, he didn't. You better look at it.

Q. You tell us—you read it.

A. No, you tell us.

Q. What parts of this book did Bunnell write?

A. I do not know.

Q. I note this is written by a Dr. L. D. Howard, Jr., M.D.? A. That is right.

Q. Who is he, Doctor?

A. A doctor in San Francisco.

Q. Also where Bunnell is?

A. They are both in the same city.

Q. I note, Doctor, that there is a bibliography at the back of this chapter by Dr. L. D. Howard on tumors of the hand of which the section on ganglia is a part. Are you familiar with that bibliography back there?

A. Not necessarily familiar with it, no.

Q. Are you generally familiar?

A. I have a pretty good idea who those reports are taken from.

Q. What is the purpose of a bibliography in a work like [60] this?

A. To show you the people that the doctor had referred to when publishing it.

(Deposition of Dr. M. J. Dirstine.)

Q. When he would be talking about reported series would he be taking it from that bibliography?

A. No.

Q. From the works cited in the bibliography?

A. He could be—not necessarily.

Q. Well, now, under "bibliography" we first have L. Carp and A. P. Stout. Are you familiar with them? A. No.

Q. Entitled, "Study of Ganglia with Special reference to Treatment with References from 1746 to 1928;" and then we have DeOrsay, P. M. McRay, and L. K. Ferguson, "Pathology and Treatment of Ganglion, American Journal of Surgery, 36, 313 to 319, April, 1937." Are you familiar with that work?

A. Just generally, yes.

Q. Have you read it?

A. That has nothing to do with the cause. What that is, what you are talking about, primarily that has only to do with the treatment of it.

Q. Pathology and treatment?

A. That is right.

Q. What in included under the general term "Pathology"?

A. Pathology is not the etiology. Pathology is the cell structure and so forth.

Q. Now, Caplan—E. B. Caplan, "Treatment of Ganglion by Injection of Sodium Morrhuate, American Journal of Surgery, 34151, April, 1934." Are you familiar with [61] that work?

A. I know Caplan but does he say anything about the etiology, the cause of it?

(Deposition of Dr. M. J. Dirstine.)

Q. I don't know. Have you read the work?

A. I know the man.

Q. Did he say anything in there about etiology?

A. Not that I recall. I don't think anyone will tell you that.

Q. Except the doctor that wrote this chapter.

A. He does not say specifically the cause, either.

Q. Now, we have E. S. J. King, "The Pathology of Ganglia," Australia and New Zealand Journal of Surgery, 1367-381 March, 1932. Are you familiar with that work?

A. I have covered most of that at one time or another.

Q. Now, we have F. M. Lyle, "Radiation Treatment of Ganglion of the Wrist and Hand," Journal of Bone and Joint Surgery, 26 162-163, January, 1941. Do you know Dr. Lyle?

A. I am familiar with that article.

Q. Did you follow this article in giving Mr. Maloney radiation treatment?

A. That is right, that was one of the suggestions, yes, there was a possibility of helping if they do have a ganglion.

Q. But you say he didn't have a ganglion.

A. I have never seen one, no.

Q. But you gave him the radiation treatment anyway? A. The possibility, yes.

Q. You also gave him cortisone, did you not, Doctor? A. Yes.

Q. Why did you give him cortisone? [62]

(Deposition of Dr. M. J. Dirstine.)

A. Because cortisone has relieved discomfort in the wrist.

Q. Discomfort from what?

A. From anything.

Q. Is that a treatment also for ganglia?

A. It has been tried. There is no specific treatment. Several things have been tried.

Q. How long did you have him wear this splint, Doctor?

A. Oh, I don't know exactly how long. He wore it intermittently when he was working. How long he wore it around home I don't know. I have no way of knowing.

Q. Do you know whether or not an operation was at any time considered upon Mr. Maloney's wrist? A. Not by me.

Q. Who was an operation considered by, Doctor? A. I don't know.

Q. Do you have any reports there, Doctor?

A. No, sir.

Q. What is that you have been reporting from, Doctor? A. My office calls here.

Q. I would like to see it, Doctor. What is a tenosynovitis, Doctor?

A. Inflammatory irritation around the tendon.

Q. What is the fourth dorsal osteofibrous canal?

A. That is the canal on the back of the wrist through which the extensor tendons to the second, third and fourth digits pass.

Q. Has that got anything to do with the fourth dorsal vertebra? A. No.

(Deposition of Dr. M. J. Dirstine.)

Q. How long did you keep him from work, Doctor.? [63] A. I don't know.

Q. Could you tell us?

A. I think he worked off and on at various times and I always encouraged him to go back to work if he could and to wear his splint, to wear it and go back to work. I had on the 3rd of February here that he should be able to return to work on the 15th of February.

Q. And when did you write that?

Mr. Franklin: What year, Doctor?

The Witness: 1954.

Q. And when did you write that?

A. February 3rd.

Q. February 3rd? A. That is right.

Q. Well, did you recommend that he work when he first came in to you—what date was that he first came in to you?

A. I believe the 22nd—let me see here when he was first in. He was first seen on the 11th of January.

Q. And when did you think he would be able to go to work at that time? A. I did not know.

Q. And you later decided on the 2nd of February that he should be able to go to work by the 15th? A. That is right.

Q. When did you put his hand in a splint?

A. This splint was ordered I think the 22nd of January and when I saw him on the 27th, five days later, he had the splint.

Q. As part of his history, Doctor, did you elicit

(Deposition of Dr. M. J. Dirstine.)

from [64] him any information to the effect that he had been treated by another doctor who wanted to operate on the wrist? A. Not that I recall.

Q. You would not say that he did not tell you that?

A. No, I don't know. I don't recall that he did.

Q. You don't remember anything about an operation, about you being called in to see whether an operation was necessary?

A. I don't think so. That is quite awhile ago but I don't recall. As far as I recall, the only thing I know about any other doctor is on this report when I first saw him on the 11th of January, that he was injured on the 28th of June and the following day he consulted Dr. Edmund Smith and X-rays were taken.

Q. Did you know he had been scheduled for operation on that wrist?

A. Not that I know of, no.

Q. If that was the fact and you were so informed it has since slipped your memory, is that right? A. I don't know.

Q. You don't know whether it slipped your memory or not?

A. I don't know whether he told me that or not.

Q. But you wouldn't say he did not have that information at that time?

A. Well, I don't think it would make any difference to me. If a man has a doctor and he wants to operate on something and the patient wants it operated that is his own business, not mine.

(Deposition of Dr. M. J. Dirstine.)

Q. And that opinion, Doctor, is without regard to whether [65] the operation is actually necessary or not? A. Well, I am not infallible, you know.

Mr. Poth: I believe I have no further questions.

Redirect Examination

By Mr. Franklin:

Q. Doctor, how many cases of ganglion cysts would you estimate you have treated or seen in your professional career—ganglion cysts of the wrist?

A. Oh, I don't know—several hundred.

Mr. Franklin: That is all, thank you, Doctor.

Mr. Poth: That is all.

(Deposition concluded.)"

Mr. Holland: I will call Mr. Ledyard.

RICHARD F. LEDYARD

called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct Examination

By Mr. Holland:

Q. Would you state your name?

A. Richard F. Ledyard.

Q. What is your occupation?

A. Presently you mean?

Q. Yes.

A. President of the Commercial Statistical Service Company. [66]

(Testimony of Richard F. Ledyard.)

Q. What type of work is that?

A. A service bureau using a punch card system of accounting.

Q. How long have you been with that company, Mr. Ledyard? A. Since June 1, 1955.

Q. Prior to that time what was your occupation?

A. I was office manager of the Waterfront Employers of Washington.

Q. And the Waterfront Employers of Washington is what?

A. Well, it is an association of steamship companies, stevedore companies, dock companies.

Q. What, if anything, does that company have to do with the payments made to longshoremen?

A. They receive payrolls from the various waterfront employers and process and issue the paychecks, prepare quarterly social security returns and annual tax returns and keep earning records.

Q. Is that sort of a type of funneling of all earnings from the various companies through the one office and then to the longshoreman?

A. Yes.

Q. The object being so that they receive one check in their pay period? A. That is right.

Q. In connection with the wage records of the various longshoremen kept by your office, what was your job?

A. Well, I was in charge of that particular department.

Q. In connection with a record of the wages of a Mr. Shaun Maloney were you asked by a member

(Testimony of Richard F. Ledyard.)

of the firm of Bogle, Bogle & Gates to prepare a graph [67] reflecting his earnings during a certain period? A. Yes, I was.

Q. By Mr. Potter, who is no longer in our office?

A. Yes.

Q. Did you prepare such a graph?

A. Yes, I did.

Q. In making the graph did you use the individual earning records as found in your office?

A. Yes.

Mr. Holland: May I have this marked?

(Defendant's Exhibit A-1 marked for identification.)

Q. Mr. Ledyard, handing you what has been marked Defendant's Exhibit A-1 for identification, without telling the contents, state briefly what this piece of paper is?

A. Well, it is a graph of the earnings of Shaun Maloney for the period January, 1951, through March of 1955.

Q. Is that the graph that you testified you prepared? A. Yes, sir.

Mr. Holland: We offer Defendant's Exhibit A-1 in evidence.

Mr. Poth: Well, I am too confused by what I see here to be able to make a proper objection.

Mr. Holland: I will have Mr. Ledyard explain the graph and then perhaps you can object, if you like.

Q. Mr. Ledyard, I will hold the graph for you

(Testimony of Richard F. Ledyard.)

and would you just explain what the coordinates of the graph [68] mean and how the graph is read?

A. Well, the left hand side indictes, I believe $25 breaks in wages. In other words, I start with zero, $25, $50, $75, $100.

Q. How high does that go?

A. $650. Across the bottom indicates the various months of the years '51, '52, '53, '54 and through March of '55.

Q. The months are indentified by what identification? A. Just initials.

Q. And the years are marked on the graph?

A. Yes, they are.

Mr. Poth: I can hardly see the purpose of the graph. He either made money or he didn't. To me it is not a matter of a picture, it is a matter of arithmetic. I think the wages he made are the best evidence themselves. I don't think this demonstrates wages, this demonstrates some trend like cycles or something. I don't follow it.

Mr. Holland: I might say, we believe this to be a graphic representation of the earning record as contained in the office of the Waterfront Employers and indicates the man's earnings before and after the accident.

We again offer Defendant's Exhibit A-1 in Evidence.

The Court: I am thinking of Section 1732, Title 28.

Mr. Holland: Business records. [69]

The Court: Records made in the regular course

(Testimony of Richard F. Ledyard.)

of business. But this is something else. It is a graph. Why couldn't we have the records here and photographic copies of them?

Mr. Holland: Let me ask the witness.

Q. (By Mr. Holland): How are the actual records set up in that office?

A. Well, the original record is a payroll form approximately seventeen inches wide and twelve inches deep.

Q. You mean individual sheets? A. Yes.

The Court: Couldn't a memorandum be taken from the records, rather than bring them in, or a summary of them, rather than something that is going to take a scientific mind to figure it out? I haven't seen the exhibit, but it seems to be confusing to counsel and if he is confused, I am kind of afraid I would be too.

Now, there are records somewhere at your command which will show the wages earned by this plaintiff during a period of time.

Mr. Holland: That is correct.

The Court: I am going to deny the document being admitted in evidence.

Mr. Holland: I might state that the earnings have been read off——

The Court: I will give you permission to introduce in evidence any document which would properly be admitted under Section 1732 of Title 28, [70] records made in the regular course of business, or photographic copies or any portion of

(Testimony of Richard F. Ledyard.)

the records, but I am not going to worry myself with anything of this kind or anything else.

The objection will be sustained to that document as not being evidence of a record made in the regular course of business as contemplated by section 1732 of Title 28, but counsel, it is understood the court will be glad to receive any testimony of any such record, if one is available, and I understand there is.

Mr. Holland: I might state, we believe the evidence is already in the case showing Mr. Maloney's earnings. He had a record and this is merely a graphic representation by month. We don't desire to put any more records in.

The Court: I didn't want it to appear I shut counsel out. If counsel wants evidence of any records in here I will be glad to receive them, but I don't think this is proper and I am not going to admit it.

Mr. Holland: That is all I have of this witness.

Mr. Poth: No questions.

Mr. Holland: Defendant rests.

Mr. Poth: We have no rebuttal, your honor.

The Court: I suppose you want to submit briefs, don't you?

Mr. Holland: I have, of course, [71] prepared and submitted a trial brief. Does your Honor have in mind making that comment a brief arguing the evidence?

The Court: Yes, arguing the whole case.

Mr. Holland: We are not used to that here

Normally we argue orally. But we will be glad to abide by your honor's wishes.

The Court: I would prefer to have that done.

Mr. Poth: I am very well prepared to submit a written argument, written brief.

The Court: Now, how about the transcript?

Mr. Holland: Well, in our practice here we do not have a transcript. We normally argue after the case.

The Court: I want a transcript in this case.

Mr. Holland: I see. Then when you asked us what about it——

The Court: Can you arrange for the expense of it?

Mr. Poth. I believe counsel and I can divide the cost.

Mr. Holland: Yes, that is agreeable.

The Court: Fine. So it will be understood the plaintiff has the opening and closing and you can argue the facts and the law in your brief and how much time would you like to have to [72] prepare and file your brief?

Mr. Poth: Two weeks, your honor?

The Court: Make it twenty days. Twenty days from the time you receive the transcript and then you want twenty days after receipt of his brief to reply?

Mr. Holland: I was thinking, I will be away the week of the 21st and the following week, and if Mr. Poth needed more time——

The Court: Yes, if counsel desire more time I will be glad to grant further time if it is necessary.

It will be understood you will have twenty, twenty and ten.

Mr. Poth: That is fine, your Honor.

The Court: And the time will start to run from the time the transcripts are furnished and counsel will arrange for the expense of the transcript.

(End of Proceedings.)

The following occurred on August 5, 1955, in chambers with both counsel present.

The Court: May we suggest a stipulation? Is that satisfactory?

Mr. Poth: Yes, your Honor.

Mr. Holland: Yes, your Honor.

The Court: The order sustaining the objection to the exhibit which was called a graph, defendant's A-1 is set aside and the exhibit is [73] set aside and the exhibit is admitted in evidence.

It is stipulated by and between counsel for the plaintiff and the defendant that at the time of the accident the plaintiff was of the age of forty-one years and it is further stipulated that the life expectancy of a male, Caucasian of the age of forty-one years, is 28.43 years.

Mr. Holland: That is correct.

Mr. Poth: Yes.

(End of Proceedings.)

[Endorsed]: Filed October 13, 1955. [74]

[Title of District Court and Cause.]

## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United State Court of Appeals for the Ninth Circuit and Rule 75(o) FRCP I am transmitting herewith the following original documents in the file dealing with the above cause, excluding exhibits, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers being identified as follows:

1. Complaint, filed April 2, 1954.

2. Summons with Marshal's return thereon, filed April 6, 1954.

3. Answer, filed April 12, 1954.

4. Deposition of Shaun M. Maloney, filed Nov. 19, 1954.

5. Motion Plaintiff for Trial Date, Dec. 28, 1954.

6. Note for Motion Docket, filed 12-28-54.

7. Praecipe, Plaintiff, for subpoenas, filed 3-7-55 (in blank).

8. Deposition of Dr. M. J. Dirstine, filed 7-29-55.

9. Trial Memorandum, filed Aug. 3, 1955.

10. Argument of Plaintiff, filed Sept. 7, 1955.

11. Argument of Defendant, filed Oct. 3, 1955.

12. Plaintiff's Reply to Defendant's Answer, filed Oct. 12, 1955.

13. Court Reporter's Transcript of Testimony, filed Oct. 13, 1955.

14. Opinion, Findings of Fact and Conclusions of Law, filed Feb. 23, 1956.

15. Motion Defendant for Reconsideration, filed March 9, 1956.

16. Motion Defendant for New Trial, filed 3-9-56.

17. Judgment for Plaintiff, filed 3-12-56.

18. Reply of Plaintiff to Defendant's Motion for New Trial, filed March 16, 1956.

19. Memorandum of Authorities on Defendant's Motion for New Trial, filed May 2, 1956.

20. Order on Denying Motion for New Trial, filed July 11, 1956.

21. Notice of Appeal, filed Aug. 3, 1956.

22. Cost Bond on Appeal, filed Aug. 3, 1956.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for preparation of the record on appeal in this cause, to wit:

Filing fee, Notice of Appeal, $5.00; and that said amount has been paid to me by the attorneys for appellant.

Witness my had and official seal at Seattle this 27th day of August, 1956.

[Seal] MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy.

---

[Endorsed]: No. 15244. United States Court of Appeals for the Ninth Circuit. Johnson Line, a Corporation, Appellant, vs. Shaun Maloney, Appellee. Transcript of Record, Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: August 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15244

JOHNSON LINE,

Appellant,

vs.

SHAUN MALONEY,

Appellee.

## STATEMENT OF POINTS RELIED UPON AND DESIGNATION OF RECORD

Comes Now the defendant-appellant herein and pursuant to Rule 17 (6) of this Court sets forth the points on which it intends to rely as follows, to wit:

1. That the trial court committed reversible error in entering judgment for the plaintiff for the reason that there was no credible evidence or inferences from evidence from which the court could have concluded that the defendant had notice of the wheat upon which the plaintiff slipped or that the said wheat had existed on the deck a sufficient length of time to constitute constructive notice to the defendant and for the reason that in the absence of such evidence there is no liability on the part of the defendant.

2. That the trial court committed reversible error in that the damages awarded were excessive and were not supported by the evidence.

The appellant designates the entire record as necessary for the consideration of the appeal, excepting only the following:

1. Summons with Marshal's return thereon, filed April 6, 1954.

2. Deposition of Shaun Maloney, filed Nov. 19, 1954.

3. Motion, Plaintiff, for Trial Date, filed Dec. 28, 1954.

4. Note for Motion Docket, filed 12-28-54.

5. Praecipe, Plaintiff, for subpoenas, filed 3-7-55 (in blank).

BOGLE, BOGLE & GATES,
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 24, 1956.

No. 15244

# United States Court of Appeals

## For the Ninth Circuit

JOHNSON LINE, a Corporation, *Appellant,*

vs.

SHAUN MALONEY, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT


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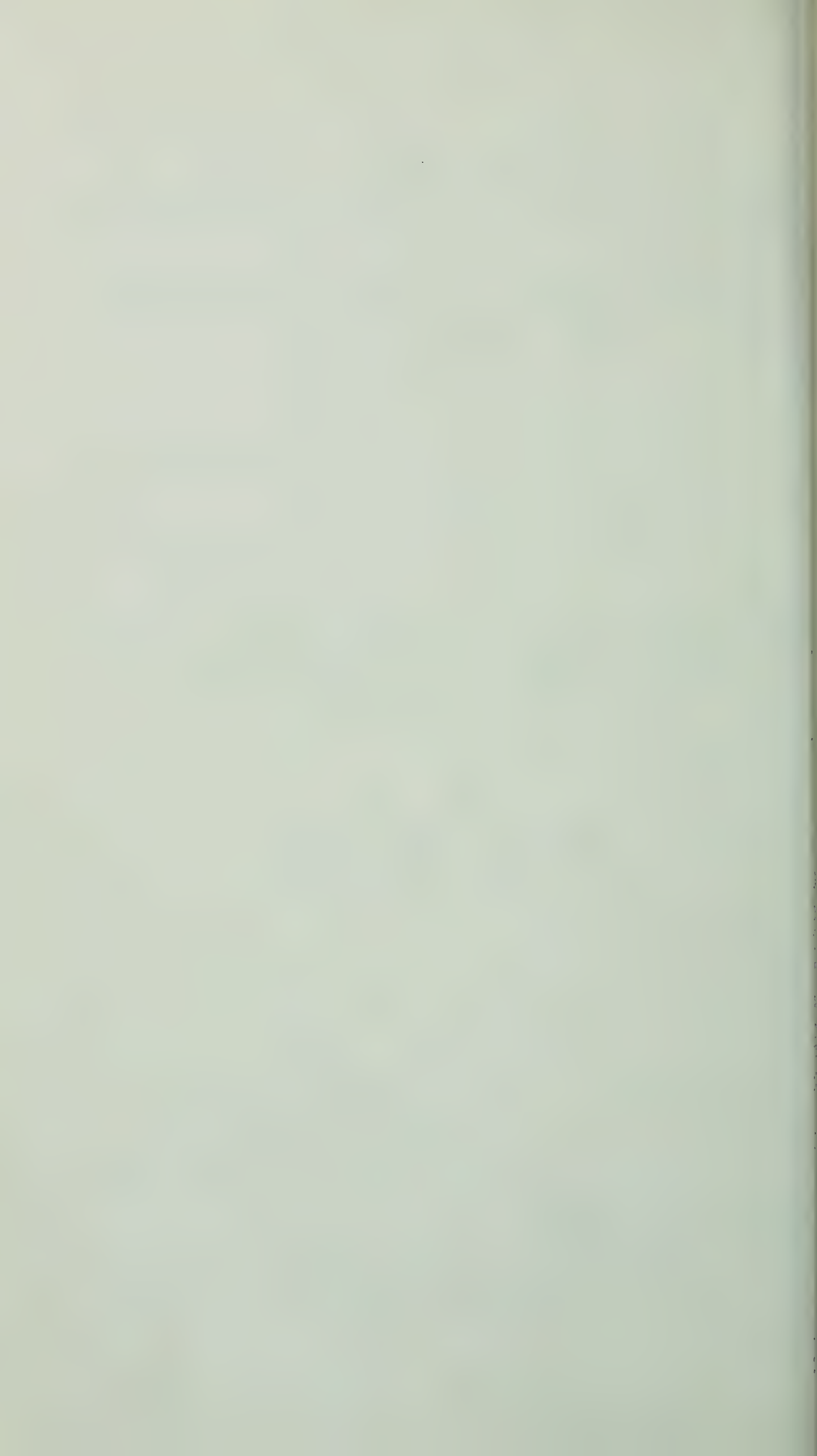

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# United States Court of Appeals

## For the Ninth Circuit

| | | |
|---|---|---|
| JOHNSON LINE, a Corporation, *Appellant,* | | |
| vs. | | No. 15244 |
| SHAUN MALONEY, *Appellee.* | | |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLANT

### STATEMENT OF JURISDICTION

This is an appeal from the final decree of the United States District Court for the Western District of Washington, Northern Division, awarding to appellee herein the sum of $22,300.00 and costs for injuries received by him in a fall on June 28, 1953, when he was engaged in the course of his employment as a longshoreman aboard the SS GOLDEN GATE, a merchant vessel owned and operated by the appellant.

The jurisdiction of the District Court is conferred by the provisions of Title 28, U.S.C.A. §1332.

The jurisdiction of this Court is conferred by the provisions of Title 28, U.S.C.A. §1291 which gives to the Courts of Appeal jurisdiction of all appeals from final decrees of District Courts.

## STATEMENT OF THE CASE

On June 28, 1953, the appellant's vessel SS Golden Gate was engaged in cargo operations at a dock in the Port of Seattle, Washington. Aboard the vessel and preparing to work the cargo was a gang of longshoremen among whom was the appellee, Shaun Maloney. Since the vessel had just prior thereto arrived from the Port of Tacoma, Washington, it was necessary that the men first remove the tarpaulins and hatchboards from the various holds preliminary to their actual handling of the cargo. The appellee and members of his particular gang were assigned to hatch No. 7 which was the after hatch on the vessel. Upon arriving at this hatch it was found that it was completely closed or "battened down" in condition for sea. Prior to this time there had been no longshoremen aboard the vessel in the Port of Seattle.

After the tarpaulins and hatchcovers had been removed the appellee started down a ladder to the tween deck area (Tr. 61). When the appellee reached this area he stepped off the ladder, took a step or two and then slipped and fell (Tr. 61). He testified that the tween deck had a heavy covering of wheat dust and wheat kernels which resulted in a slippery condition (Tr. 62). This condition was not visible from the weather or upper deck of the vessel prior to his starting down the ladder (Tr. 62).

The witness William Dibble, who as supercargo supervised the loading and discharging of the vessel both at Seattle and Tacoma, stated on direct examination that as a part of their work the longshoremen cleaned up the deck of loose wheat at Tacoma prior to the ves-

sel's going to Seattle (Tr. 91). This loose wheat had resulted from the wheat cargo being loaded at Tacoma (Tr. 90).

The appellee completed his work on the vessel (Tr. 82) and then reported to Dr. Smith who diagnosed a wrist sprain and commenced physiotherapy treatments (Tr. 82). He called upon Dr. Bernard Gray on December 28, 1953, who recommended that he wear a leather cuff (Tr. 68). He received no further treatment.

The appellee testified that it was necessary for him on occasions to lay off work briefly because of swelling of his arm (Tr. 73). As of the date of the trial (August 3, 1955) he computed that he had lost 184 days or approximately $2,300.00 as a result of the disability of his hand and wrist (Tr. 74). His average monthly earnings during 1955 up to the date of trial, however, were greater than any past earnings in evidence either before or after the injury (Tr. 86).

## STATEMENT OF QUESTIONS INVOLVED

1. Whether the trial court committed reversible error in refusing to apply the rule of transitory unseaworthiness under the facts of the case.

2. Whether the trial court committed reversible error in awarding excessive damages unsupported by the evidence.

## SPECIFICATIONS OF ERRORS

The court erred in its entry of Findings of Fact, Conclusions of Law, Final Decree and Judgment awarding appellee a judgment against the appellant in the sum of $22,300.00 together with costs and interest.

## ARGUMENT

### A. The Doctrine of Transitory Unseaworthiness

The doctrine of transitory unseaworthiness, sometimes referred to as the Cookingham doctrine, states that a defendant vessel operator is not to be held liable for injuries resulting from unsafe conditions on his vessel unless he has had a reasonable opportunity to discover and correct the hazards. This doctrine excludes defective appliances and defective structural conditions aboard a vessel but applies to "transitory conditions" such as oil, grease, and other foreign substances which render the particular area in question an unsafe place to work.

Prior to the consideration of this doctrine with reference to the facts of the case at bar it is necessary to refer to all of the testimony which can be said to have a bearing on the application or non-application of this rule.

The defendant's witness William Dibble was supercargo aboard the vessel at Tacoma where the wheat was loaded prior to the time the vessel came to Seattle. He testified that it was standard practice that the vessel was cleaned in Tacoma following the loading (Tr. 92).

Concerning the arrival of the vessel at Seattle and her condition, the appellee testified:

> "Q. If you know, when had the ship come in?
>
> A. Sometime during the night.
>
> Q. If you know, had there been any longshoremen aboard the ship after she came in prior to the time you came aboard?
>
> A. No, there was no one aboard, other than the crew.

Q. Do you know where she had come from?

A. She had come from sea. I don't know what port.

*   *   *   *   *   *   *   *

Q. What was the condition of that hatch at the weather deck level as you went down there?

A. As I recall there was the small punt or raft that the sailors paint with, a couple of other boxes on the deck, and that is all that was on the deck to my knowledge that I recall. The hatch was covered.

Q. How was it covered?

A. As is the usual manner, with pontoons or hatch covers and tarpaulins over them.

Q. As you saw the hatch was it in condition for sea?

A. Yes, it was." (Tr. 59-60.

The appellee's witness Oscar Hurst, a fellow longshoreman, testified as follows on the condition of the hatch at the time the men commenced work:

"Q. Was that 8 o'clock in the morning?

A. 8 o'clock in the morning.

*   *   *   *   *   *   *   *

Q. And what, if anything, did you do when you went to that hatch at the after end of the ship?

A. Well, the first thing we did was to—is to take off the tarpaulins and then take off the hatches and then descend below to work the cargo.

*   *   *   *   *   *   *   *

Q. Do you know who the first man down the ladder was?

A. Yes, I do remember.

Q. Who was that?

A. That was Maloney." (Tr. 50)

The appellee also described what was done after the hatch was opened:

> "Q. After you removed the tarpaulins and the hatch covers as you have related, what next did you do?
>
> A. I started down the ladder.
>
> *   *   *   *   *   *   *   *
>
> Q. Did anybody proceed you down that ladder?
>
> A. No, sir, I was the first man down." (Tr. 61)

From the foregoing testimony it is evident that the vessel loaded grain in Tacoma, Washington, and then traveled to Seattle through the night with the hatch completely covered.

As a probable explanation of how the wheat kernels and wheat dust, if any, came to be on the deck in the area of appellee's fall, the appellee testified as follows:

> "I didn't look into the feeder box, but I would assume there was grain in there because when you pour wheat into a ship or any bulk grain cargo they have a certain amount of it that you can see. There is evidence of it. They shoot it in and some of it slips out through cracks and spills and things like that." (Tr. 81)

The witness Dibble confirmed the appellee's testimony in this regard:

> "A. Well, there is always a certain amount that spills over, of course, when they are pouring the wheat. They clean up the decks as best they can and all of the wheat is put into the hold where it is supposed to be. Occasionally there is a little wheat slops over, gets on the decks." (Tr. 90)

The doctrine of transitory unseaworthiness is first to be found in the frequently cited case of *Cookingham*

*v. United States* (3rd Cir. 1950) 184 F.(2d) 213, cert. den. 340 U.S. 586, 95 L.ed. 675. The court there held that there is no liability on the part of a shipowner following an injury caused by a transitory unsafe condition of which the vessel and its officers had no notice. The court considered both negligence and unseaworthiness as applied to a situation where a crew member had slipped on jello which had been dropped on a vessel's stairway. The court held:

> "There being no evidence as to how long a time the jello had been on the step prior to the accident, a finding that the ship's officers were negligent in failing to remove it after they knew, or should have known of its existence, would, we think, not have been warranted."

As to seaworthiness, the court stated:

> "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use, as happened in the case before us."

The approval and application of this doctrine in a maritime injury case occurring under circumstances similar to the case at bar is to be found in the trial and appellate court reports of *Pope & Talbot v. Hawn,* 346 U.S. 406, 98 L.ed. 143, 74 S.Ct. 202. The workman in that case was injured as a result of a fall from the tween deck to the lower hold of the vessel while it was tied up in port. This case was tried to the jury in the District Court of the Eastern District of Pennsylvania. The decision of the court on the defendant's motion for

judgment *n.o.v.* is to be found at *Hawn v. Pope & Talbot, Inc.*, 99 F.Supp. 226. At page 229 of the decision District Judge McGranery states as follows:

> "Whether there was any evidence of unseaworthiness, however, is a close question. The evidence reveals three possible grounds for a finding of unseaworthiness: (1) the slippery condition of the deck and hatch covers because of the presence of grain dust deposited by a partial grainloading; (2) inadequate lighting in the 'tween deck section of the hold where the accident occurred; and, (3) the absence, for some time prior to the accident, of a hatch cover at the point where the plaintiff fell, the evidence being that on the preceding day, ship cleaners had noticed missing hatch covers in the vicinity. Under the recent Third Circuit decision of *Cookingham v. U. S.*, 184 F.(2d) 213, noted 19 Geo. Wash. L. Rev. 341, the first two conditions may not be described as conditions of unseaworthiness. *The slipperiness of the decks because of grain dust from a loading was merely a transitory unsafe condition resulting from the normal use and operation of the ship, involving no inherently defective appliance.* The same may be said of the lighting conditions. It is difficult to determine whether the absence of a hatch cover for a period of a day prior to the accident is merely a transitory condition, without evidence of how long the condition actually existed. *Cf.* Judge Biggs' dissent in the *Cookingham* case. In the instant case, the court concludes that the evidence would warrant a finding of unseaworthiness." (Emphasis supplied)

While the circuit court on appeal found that the slippery condition, combined particularly with the absence of the hatch covers, could have presented a situation

from which negligence could be inferred, it stated (*Hawn v. Pope & Talbot, Inc.*, 198 F.(2d) 800):

> "On the merits of this point appellant argues that there was no evidence of unseaworthiness. The contention is not borne out by the record. The absence of the hatch covers in the 'tween deck where Hawn was supervising his workmen and with the facts justifying an inference of the existence of that situation for such a period as to remove it from the type of transitory conditions exemplified in *Cookingham v. United States* (3 Cir.) 184 F. (2d) 213, certiorari denied 340 U.S. 935, 71 S.Ct. 495, 95 L.ed. 675, was sufficient to allow submission of that question to the jury. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 64 S.Ct. 455, 88 L.ed. 561."

It will be noted from the foregoing that the circuit court accepted the doctrine of *Cookingham* but stated that the facts of the condition of the hatch covers did not justify the application of that doctrine to the hatch covers. Inferentially the court was indicating that the presence of the grain dust did properly come within the *Cookingham* doctrine and therefore was a type of transitory condition.

The appeal of this case to the United States Supreme Court involved other points not pertinent here.

In *Daniels v. Pacific-Atlantic Steamship Company* (1954-E.D.N.Y.) 120 F.Supp. 96, the court considered the question of whether the mere presence of a spot of oil or grease constituted unseaworthiness as a matter of law and rejected the contention. The court stated (p. 99):

> "*The mere presence of grease or oil or other transitory substance on a deck of a vessel, causing*

*one to slip and sustain injuries has been held not to constitute unseaworthiness. The ship owner is not an insurer of safety. Hanrahan v. Pacific Transport Co.,* 2 Cir. 1919, 202 F. 951, certiorari denied 252 U.S. 579, 40 S.Ct. 345, 64 L.ed. 726; *The Seeandbee, supra; Adamowski v. Gulf Oil Corporation, supra; Cookingham v. United States* (3 Cir., 1950) 184 F.(2d) 213; *Holliday v. Pacific Atlantic S.S. Co., supra; Shannon v. Union Barge Line Corp., supra,* and *Hawn v. Pope & Talbot, Inc., supra.* In the *Hanrahan v. Pacific Transport Company* case, the court determined that the temporary absence of a handrail did not warrant a finding of unseaworthiness. *As heretofore stated, it was held in The Seeandbee case that the presence of grease and oil on the deck did not render the vessel unseaworthy.* In the *Adamowski* case (93 F. Supp. 117), the plaintiff claimed he slipped while going through a dark passageway, where later an oil spot was discovered. The court said, ' * * * The defendant cannot be held liable for unseaworthiness * * *. The passageway in which the plaintiff slipped was perfectly sound.' In the *Cookingham* case, it was held that a transitory unsafe substance on a stairway, such as jello, was not unseaworthiness. In the *Holliday* case, the court followed the *Cookingham* case and held that wires protruding from a package or box in an ice-box, did not amount to unseaworthiness. In the *Shannon* case, the claimant slipped on an oil spot on the deck and fell against a metallic bar, running diagonally across a doorway. The bar was in good repair. It was held that no unseaworthiness existed. In the *Hawn v. Pope & Talbot* case, the court followed the *Cookingham* case and stated that a deck made slippery because of grain dust from loading was a transitory

> unsafe condition, resulting from the normal use and operation of the ship, involving no inherently defective condition and hence not unseaworthy."

The basis of the *Cookingham* doctrine is notice. The courts have refused to hold a shipowner liable for a transitory unsafe condition unless it can be shown that the shipowner had actual or constructive notice. As stated in *Gladstone v. Matson Navigation Co.* (Cal.) 269 P.(2d) 39:

> "While generally there is an absolute liability on a shipowner regardless of notice, for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness, and no fault or failure of appliance or equipment, the shipowner's liability arises only from failure to remove that transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from transitory unseaworthiness."

In *Guerrini v. United States* (2 Cir. 1948) 167 F.(2d) 352, the court was considering a slippery condition resulting from a patch of grease. The court stated (p. 356):

> "In the case at bar the findings are not sufficient finally to dispose of the case; for, although the judge found the respondent negligent, that is not a finding of fact. True, he found that the libelant had slipped upon a patch of grease, but he did not find how long it had been on the deck; and the cause must go back for a specific finding on that issue, because the respondent's negligence depends upon how long the grease had been on the deck. Unless the libelant satisfies the judge that a patch of the size described had been left in the place de-

> scribed for a period long enough to be noticed by the officer on watch, the libel must be dismissed."

In *Poignant v. United States* (2 Cir. 1955), 225 F.(2d) 595, the Second Circuit considered the question of transitory unseaworthiness with respect to the presence of an apple skin on the passageway of the vessel which caused the libelant to slip, fall and sustain an injury. The court first referred to the *Cookingham* and subsequent cases, *supra,* commenting that it had been held in those cases that there was no breach of warranty of seaworthiness under such conditions involving transitory substances. The court was cognizant of the rule of *Alaska Steamship Company v. Petterson,* 347 U.S. 396, 74 S.C. 601, 98 L.ed. 798, but in referring to it stated as follows (p. 598):

> "Nevertheless, that opinion (*Petterson*) does not go so far as to hold that unseaworthiness arises from every defect in a vessel or in its equipment or maintenance, whether consisting of a transitory substance or otherwise."

The court then referred to *Boudoin v. Lykes Bros. SS Co.,* 348 U.S. 336, 75 S.Ct. 382, 384, stating that this subsequent decision makes it abundantly clear that the United States Supreme Court did not overrule the long-settled doctrine that to be seaworthy a vessel does not need to be free from all cause of mishap — that it is enough if it is "reasonably fit." The Second Circuit then stated (p. 598):

> "We think the import of the *Boudoin* case is that just as the vessel is not unseaworthy because of the misbehavior of a seaman whose disposition and skill is the equal of that of ordinary men in the calling, *so it does not become unseaworthy by*

> *reason of a temporary condition caused by a transient substance if even so the vessel was as fit for service as similar vessels in similar service.*" (Emphasis supplied)

In a case involving a longshoreman illness arising out of an unusual amount of carbon disulfide in the grain being loaded aboard the ship the District Court of Maryland in *McMahan v. The Panamolga,* 127 F.Supp. 659 at page 670, referred with approval to the *Cookingham* and *Daniels* cases, *supra,* and stated:

> "In my opinion the warranty of seaworthiness does not go so far as to make the shipowner liable to libelants in this case for any injury which they may have sustained by reason of the presence of an unusual amount of carbon disulfide in the grain being loaded on board the ship. Any claim which libelants may have arising out of this condition must be based upon the alleged negligence of the shipowner or its agents."

It is to be noted in the above case that the conclusions of law were under the two headings of "seaworthiness" and "negligence" and that the above-quoted portion was contained under the "seaworthiness" heading.

In connection with the foregoing cases illustrating the application of the doctrine of transitory unseaworthiness or unsafe conditions as set forth in the *Cookingham* case, *supra,* the court is respectfully reminded of the testimony in the record indicating that the necessary cleanup work in the hold was done at Tacoma prior to the vessel's travel to Seattle; that this particular hold was completely closed or battened down at the time of the vessel's arrival at Seattle; and that the appellee Maloney was the first man down into the hold.

This uncontradicted testimony clearly failed to establish that the officers or the crew of the vessel observed the tween deck area in question or had an opportunity to observe the same as to whether or not it was covered with wheat kernels or wheat dust. In the absence of proof that the officers observed or had an opportunity to observe this condition, the vessel did not have a sufficient amount of notice either actual or constructive. Thus the basic element necessary for the application of the *Cookingham* doctrine, namely lack of notice, is present and the said doctrine is therefore properly and necessarily applicable. Accordingly, the doctrine should have been applied by the lower court and the complaint dismissed.

**B. The Damages Awarded by the Trial Court Were Clearly Excessive**

As its second assignment of error the appellant contends that the trial court committed error in that the damages awarded were excessive; that the quantum thereof was such as to shock the conscience and that the complete lack of any credible evidence in the case to support the amount of the judgment indicates without possibility of dispute that a gross injustice has been suffered by the appellant. This is clearly established by the testimony of the medical witnesses including the evidence most favorable to the appellee together with the record of the work activities of the appellee following the injury.

The appellee testified that he continued working during the balance of the stevedore operations on the Golden Gate and that he was then sent by his employer

to a Dr. Smith who diagnosed a sprain and recommended physiotherapy treatments. This doctor indicated that there was no reason why Maloney could not continue working (Tr. 82). The appellee received several physiotherapy treatments between June 28 and December 28, 1953, following which he reported to Dr. Bernard Gray on December 28, 1953 (Tr. 66). As of that date he reported to Dr. Gray that he had had no time loss (Tr. 67). It is to be noted that the original findings of Dr. Gray on this date of examination were meager. The doctor found only a small limitation of motion (Tr. 67), "some" swelling at the top of the wrist and advised the patient to wear a leather cuff (Tr. 68). The x-rays which were taken by Dr. Gray revealed nothing significant (Tr. 68).

The appellee did not return to Dr. Gray for treatment or further examination until just prior to the trial on August 1, 1955, almost two years later (Tr. 68). His history of work as of that date was that "he had been working since that time" (Tr. 68).

Dr. Gray found the range of motion the same as before, a small lump on the back of the right wrist which was tender, *slight* weakness of grip in the hand which was not marked, and nothing significant in further x-rays (Tr. 69). Dr. Gray felt that the condition of appellee's hand was stationary at the time and estimated the permanent disability at between 15% and 20% of the hand (Tr. 71).

Dr. Morris Dirstine examined the appellee on behalf of the defendant and for purposes of trial on January 11, 1954. At that time there were no objective findings

(Tr. 98). On a subsequent examination on February 3, 1954, the appellee reported much less discomfort in his wrist (Tr. 99). Again on February 15, 1954, the appellee reported no discomfort in his wrist (Tr. 100) and again on February 19, the doctor found no evidence of swelling or of a ganglion or tumor.

On August 17, 1954, the appellee again reported to Dr. Dirstine and stated that he had been able to carry on his occupation but with *some* discomfort (Tr. 101). At that time there was no evidence of a tumor formation and the appellee had complete range of all motions of his wrist (Tr. 101). On his last examination of September 30, 1954, Dr. Dirstine again found no objective findings or disability, swelling, or tumor formation but found good range of wrist motion without inflammatory reaction. The patient at that time presented a normal hand and wrist (Tr. 102). With reference to the qualifications of the two doctors who testified at the trial it is material to note that while Dr. Gray was a specialist in general orthopedic and traumatic surgery (Tr. 65), Dr. Dirstine had limited himself to surgery of the hand for a period of ten years (Tr. 96) and that he had treated or observed several hundred ganglion cysts of the wrist in his professional experience (Tr. 115).

Even if this Court disregard completely the testimony of the doctor produced by the appellant and rely solely on the testimony of the appellee's medical witnesses, it is obvious that the monetary value placed upon the appellee's injury is completely unsupported by the evidence.

The earnings of the appellee as contained in his own testimony for a period preceding the accident and following the same may be tabulated as follows:

| | | |
|---|---|---|
| 1952 | $2383.32 | |
| 1953 | 4663.28 | |
| 1954 | 2988.32 | (Tr. 85) |
| 1955 (to date of trial) | 2750.00 | (Tr. 86) |

During the year 1954 an ankle injury kept the appellee from work from September 18, 1954, to December 6, 1954 (Tr. 85).

From the above earnings we have calculated the average monthly rate for these years as follows:

| | |
|---|---|
| 1952 | $198.61 |
| 1953 | 388.60 |
| 1954 | 324.88 |
| 1955 (to date of trial) | 400.00 |

The above figures together with appellant's exhibit A-1 indicate the normal fluctuating earnings of workmen of this type. Of particular significance is the very high rate of monthly earnings made by appellee during the immediate past seven months prior to the trial which averages higher than any of the three previous years.

In an attempt to portray vividly the excessiveness of the damages which have been awarded to appellee herein it is of some value to note what both juries and courts have done in other jurisdictions for similar or greater injuries.

One of the most exhaustive of recent works on the question of damages is to be found at 16 A.L.R.(2d) 3 wherein 390 pages of text are devoted to a study of cases

from 1941 to 1950 covering all portions of the human body. The subdivision on the wrist including fractures, dislocations, sprains and other injuries is to be found at page 385. Of 18 cases tried to a jury for wrist *fractures* wherein the amounts were held not to be excessive, only two cases reported verdicts in excess of the amount awarded appellee herein. Of these 18 cases 13 reported verdicts of $10,000.00 or less.

Of the six *fracture* cases reported wherein damages were fixed by the court, none of the reported cases exceeded the verdict awarded appellee herein. Seven *fracture* cases were listed with verdicts held to be excessive and none of these verdicts as reduced by remittitur exceeded $15,000.00.

Under the section on dislocation or sprains of the wrist, five cases were reported as being not excessive ranging from $400.00 to $15,000.00. Of those wherein damages were fixed by the court, two cases were reported, neither exceeding $3,000.00. Of those held to be excessive two were reported and they did not exceed $8,000.00 as reduced.

Under the caption "Wrist—Other Injuries" of those held not excessive 15 cases were reported with only two exceeding $12,000.00. In this category of those tried by the court six were reported with only one exceeding $14,000.00. Of those held to be excessive seven were reported with only one exceeding $20,000.00.

The appellant realizes the difficulty in comparing various injury cases and the results thereof but it appears from the foregoing extensive annotation that for a ganglion cyst, and for a 15% limitation of motion of

the wrist together with accompanying weakness, as testified to by the appellee's medical expert, the appellee has been awarded an amount far in excess of the amounts contained in the reported cases in the annotation referred to even where those cases involve *serious injuries involving single or multiple fracture.*

## CONCLUSION

Appellant respectfully submits that the trial court failed to apply the proper rules of law to the facts of the case since the appellee's accident and the circumstances surrounding it clearly fall within the ambit of operation of the doctrine of transitory unseaworthiness.

Appellant also respectfully submits that a careful review of the medical evidence most favorable to the appellee does not in any way support the amount of the judgment rendered and that the disparity between the medical evidence and the judgment is such as to shock the conscience of one administering justice.

Respectfully submitted,

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No. 15244

# United States Court of Appeals
## For the Ninth Circuit

Johnson Line, a Corporation, *Appellant,*

vs.

Shaun Maloney, *Appellee.*

On Appeal from the United States District Court for the Western District of Washington, Northern Division

## BRIEF OF APPELLEE

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# United States Court of Appeals

## For the Ninth Circuit

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| JOHNSON LINE, a Corporation, *Appellant*,<br>vs.<br>SHAUN MALONEY, *Appellee*. | No. 15244 |

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

## BRIEF OF APPELLEE

### STATEMENT OF JURISDICTION

A judgment was entered against the appellant on the 12th day of March, 1956, in the District Court for the Western District of Washington, Northern Division (R. 33). The cause giving rise to the judgment was tried before the Honorable Roger T. Foley, sitting without a jury on the civil side of the court.

Prior to entry of the judgment, the district judge prepared his own Opinion, Findings of Fact, and Conclusions of Law (R. 16). Also, prior to the entry of judgment, the defendant below filed its motion for a new trial (R. 29).

After consideration of the grounds asserted for a new trial, the court rendered an additional opinion and Order denying the motion for a new trial (R. 42), which was filed on the 6th day of July, 1956. This appeal has followed.

## JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is conferred by the provisions of Title 28, U.S.C.A. §1332.

## JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28, U.S.C.A., §1291, which gives to the Courts of Appeal jurisdiction of all appeals from final judgments of District Courts.

## STATEMENT OF THE CASE

An excellent statement of the case is contained in the Opinion and Findings of Fact which were prepared by the trial judge (R. 16-27). It, therefore, is appropriate that appellee adopt the same together with the court's further Opinion ruling on a new trial (R. 42-46) as its statement of the case.

### "Opinion, Findings of Fact and Conclusions of Law (R. 16)

"On the morning of June 28, 1953, plaintiff, Shaun Maloney, in the course of his employment as a stevedore, was ordered along with others to uncover No. 7 hatch of the vessel Golden Gate and to descend to the 'tween-deck and there to discharge cargo from the vessel. He was the first to descend and after taking a step or two from the ladder, plaintiff slipped and fell, thereby injuring the wrist of his right hand, as will hereinafter appear. After the injury he continued his work on the ship.

"Plaintiff received physical therapy treatments from Dr. Smith and was on December 28, 1953, examined by Dr. Bernard Gray, a well-qualified physician and sur-

geon specializing in orthopedic and traumatic surgery. In response to an inquiry as to what his examination disclosed, Dr. Gray testified:

"'He [plaintiff] told me that he had been hurt six months previously on June 28, 1953. He was a longshoreman aboard a vessel and he stated that he slipped on some wheat apparently and in order to catch himself—or, he caught himself on his wrist and in so doing he hyperextended or bent his wrist backward rather forcefully. He said that he had immediate pain and his wrist became very painful and swollen by the next day. He consulted his doctor, Dr. Smith, who put him on treatment at that time.

"'He had no time loss and he states that he favored his wrist for a couple of months and it tended to improve for a while and then got worse. He said he had never hurt his wrist before. He was right handed. At the time I first saw him I noted that as far as examination was concerned, there was ten degrees limitation of motion forward and backward at the wrist. That the grasping power of the hand was weak and there was some swelling at the top of the wrist and the circumference of the wrist was three-eighths of an inch greater than the left. I made some X-rays at the time which revealed nothing significant. I advised that he wear a leather cuff, a so-called Colles cuff, which would immobilize the wrist and take the load off of it. I suggested he come back and see me in about ten days and that was the last I saw of him until a few days ago.'

"In response to the inquiry, 'What did you find on this examination?' Dr. Gray continued:

"'I saw him August 1, 1955. He told me that

after I had seen him he had been seen again by his doctor who immobilized the wrist in plaster for a few weeks and advised surgery to the wrist. He was then sent to Dr. Morris Dirstine who examined him and recommended X-ray treatment and applied the cuff which had been recommended. At that time he was off work for an interval. X-ray treatment did not contribute much to his relief. He had been working since that time, most of the time doing lighter work. At the time I saw him he was driving a bull. [A small truck used to lift loads.] If his work would tend to be heavy he wore his cuff. He had certain residual complaints with reference to the right wrist. He had pain in lifting, especially if the hand was in hyperextension, with the wrist bent backwards. Any exertion caused pain and tended to persist for variable lengths of time. The swelling or lump he had at the back of the right wrist would blow up at times and quieten down at times, but there always was some swelling there and the only relief he could get was if he did not exercise his wrist or if he wore his cuff. At the time I examined him I thought that the range of motion was the same as before. There was some limitation of motion, ten degrees, which can be estimated as equivalent to about fifteen per cent. There was a small ganglion or lump at the back of the right wrist which was tender and which could be made to enlarge by bending the hand down. There was slight weakness of grip in the hand, but this was not marked. There was pain on forced motion of the wrist. This is about the extent of the findings on examination. I took new X-rays which showed no change and nothing significant.

" ' * * *

" 'Oh, I think that he has got a stationary con-

dition, or, the basis of the condition is stationary. I think that with over-exertion he will have aggravation. I think he will probably end up having surgery on this wrist and an attempt made to remove this ganglion.

" ' * * *

" 'If removal of the ganglion is successful I think he will have some improvement. If it is not successful, or if it will recur, his condition will be the same. I think the stiffness of the wrist, whatever degree of limitation of motion he has, will be permanent, whether the ganglion is removed or not. I think if he did light work for a long period of time the tendency would be that he would feel pretty good, but when he went back to heavy work he would have some trouble in his wrist again.'

"And further the Doctor testified:

" 'Oh, I think the function of his right wrist has been limited and will be limited. If I was going to estimate the degree of permanent disability, I would estimate it at between fifteen and twenty per cent of the loss of the hand at the wrist.'

"The plaintiff, a forthright and fair witness, testified that his calculated loss of time as a result of the injury was 184 days representing a loss of about $2,300 in wages. As we have seen, this loss of time occurred after December 28, 1953, the day of his first visit to Dr. Gray. It is evident that after the injury he carried on his work with pain and discomfort and that he will continue to suffer pain in the performance of work involving the use of his wrist.

"At the time of the injury, June 28, 1953, plaintiff was 41 years of age and in sound health. He had been a

longshoreman for 5 years prior to his injury, June 28, 1953, and for 10 years before his experience as longshoreman, he had been a sailor in the Merchant Marine. The testimony does not disclose that he has had training qualifying him to earn his living other than by means of physical toil.

"From the cross-examination of plaintiff we learn that he earned as a longshoreman in the year 1952, $2,-383.32; in 1953, $4,663.28; and in 1954, $2,988.32. His job opportunity was not as good in 1952 as it was in 1953 and subsequently. This he explained by pointing out as follows:

> " 'Well, first, the regular longshoremen get the first—the fully registered men on the basis of seniority get the first chance at the job. Any work left over comes to the temporary pool or the partially registered men.'

"Some of the differences in annual pay are explained by the increased job opportunity by being placed on the fully registered board and the layoff, due to the complained of injury, of 184 days, and the fact that due to a sprained ankle to was unable to work from September 18, 1954, until December 6, 1954.

"The method of ascertaining damages used by Chief Judge Leahy, District of Delaware, in Yates v. Dann, 124 F. Supp. 125 on 133, is applicable to the situation here. In his opinion the Judge stated:

> " '[1, 2] Where physical disability in a particular case is such it may extend for a period of time or permanently into the future, the method of ascertaining the measure of damages is by determining the loss of earning power rather than to meas-

ure future losses by referring to past losses. A man may have a physical disability which would justify him in accepting only limited employment with a corresponding lower rate of pay, but because of economic necessity a man may assume duties beyond his physical capacity in order to earn a higher rate of pay.

" 'This question was presented to the Supreme Court of Pennsylvania, in Bochar v. J. B. Martin Motors, 374 Pa. 240, at page 244, 97 A. 2d 813, at page 815: "The defendants contend that there was no evidence of impairment of earning power and that the fact that Bochar's wages were higher after the accident than before proves no deterioration of earning ability. A tort feasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident. Parity of wages may show lack of impairment of earning power if it confirms other physical data that the injured person has completely recovered from his injuries. Standing alone, however, parity of wages is inconclusive. The office worker, who loses a leg has obviously had his earning ability impaired even though he can still sit at a desk and punch a comptometer as vigorously as before. It is not the status of the immediate present which determines capacity for remunerative employment. When permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tort feasor's negligence? That is the test. And it is no answer to that test to say that there are just as many dollars in the

patient's pay envelope now as prior to his accident. The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages.'' (Emphasis added.)'

"William Patterson, a witness called on behalf of the defendant, testified that on June 28, 1953, he was aboard the vessel Golden Gate as head stevedore foreman. After such testimony, the following colloquy occurred:

" 'The Court: I would like to ask a question at this point. The gentleman testified he was employed by Grace Line Steamship. Is that the same company mentioned in paragraph IV of the complaint, the W. R. Grace Company?

" 'The Witness: They are agents for them.

" 'The Court: The point is, if there is any variance I want to know if there is going to be any point made of it.

" 'Mr. Holland (Attorney for Defendant): Perhaps I could explain and counsel can correct me if I am not correct. I think W. R. Grace & Company does stevedoring operation and they were the stevedoring contractor for this particular job and were in effect the plaintiff's employer. I think at the same time they also act in another capacity as local agent for the Johnson Line, which is a foreign corporation and therefore acted as agent and stevedoring contractor.

" 'The Court: If there was technically any variance, you make no point of that.

" 'Mr. Holland: There is no point of that, your Honor.'

"The above constitutes an admission that as an independent contractor, the W. R. Grace Company hired

the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract and the plaintiff, at all times mentioned in the complaint, acted under the orders of the W. R. Grace Company, in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

"From a consideration of all the evidence, plaintiff's injuries were proximately caused by the negligence of the defendant without any contributory negligence on the part of the plaintiff.

"The Court makes its Findings of Fact and Conclusions of Law as follows:

**"Findings of Fact**

"1. The facts recited in the discussion above are hereby adopted as the Court's Finding No. 1.

"2. That at all times mentioned in plaintiff's complaint, he was and is now a resident of Seattle, King County, Washington, in the Western District of Washington, Northern Division.

"3. That at all times mentioned in the complaint, Johnson Line, a corporation, was a foreign corporation doing business in Seattle, King County, Washington, and the owner and operator of the steamship Golden Gate, which vessel was employed as a merchant vessel in navigable waters at Seattle, Washington.

"4. That prior to the 28th day of June, 1953, the defendant entered into a contract with the W. R. Grace Company, said company agreeing to act, and acting at all times mentioned in the complaint as an independent contractor, having complete control and supervision

of all operations pertaining to the loading and discharge of cargo from said vessel Golden Gate in the Port of Seattle, in the navigable waters of Puget Sound, Seattle, Washington.

"5. That as an independent contractor, said W. R. Grace Company hired the plaintiff, Shaun Maloney, as a stevedore and entered upon the performance of said contract, and the plaintiff, at all times mentioned in the complaint, acted under the orders of the said W. R. Grace Company in its capacity as an independent contractor or employer, and not as an agent of said vessel and its said owners and operators.

"6. That plaintiff, pursuant to §933 of Title 33 U.S.C.A., has elected to recover damages against a third person other than his employer, viz., the said defendant, and plaintiff has notified the Commissioner of this District, administering the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§901 et seq., of said election.

"7. That on or about the 28th day of June, 1953, at about the hour of 8:30 a.m., plaintiff was obliged, in the course of his employment, to descend to the 'tween-deck of No. 7 hatch of the said vessel Golden Gate. That he and other stevedores were instructed by their foreman to uncover the hatch and go in 'tween-deck and discharge the cargo in the lockers and wings. That plaintiff was the first of the group to descend and the descent was made by means of a steel ladder. That after taking a step or two, after his descent, plaintiff slipped and in trying to maintain his balance, extended his right hand

and suddenly and violently fell to the surface of the said 'tween-deck in such a manner as to cause the weight of his fall to be borne on the ends of his fingers and the forepart of his hand, and that as a result of said fall, plaintiff sustained severe and permanent injuries to his right wrist and that by reason of said injuries, he has been permanently disabled in the exercise of his occupation as a longshoreman, and has lost wages and will continue to lose wages. That by reason of said injuries, he has been caused to suffer great pain and will continue to suffer great pain in the future and may be obliged to submit to surgical treatment.

"That prior to the time of receiving said injuries, plaintiff was an able-bodied man of the age of 41 years and had a life expectancy of 28.43 years.

"8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendant, its officers, agents or employees.

"9. That plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris—wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and

the slippery conditions of the said surface was due to the negligence and carelessness of the defendant.

"That plaintiff's fall and injuries resulting therefrom were occasioned solely by reason of the negligence of the defendant.

"That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom.

"10. That by reason of the hereinabove described injuries, pain and suffering, and of the impairment of plaintiff's ability to engage in his present occupation, plaintiff has been damaged as follows:

| | |
|---|---|
| For past and future pain and suffering | $10,000 |
| Loss of future earnings | 10,000 |
| Loss of earnings from time of accident to trial | 2,300 |
| Total | $22,300" |

(R. 42):

**"Order on Denying Motion for New Trial**

"Defendant Johnson Line moves for a new trial upon the following grounds:

"1. Insufficiency of the evidence to support the amount of the damages awarded to the plaintiff, and that as a result thereof the judgment entered herein is excessive.

"2. Error in law at the trial in the failure of the court to apply the doctrine of transitory unseaworthiness, and under that doctrine, in failing to find that defendant did not have actual or constructive notice of the alleged unsafe condition of the vessel.

"This action was brought pursuant to Section 933 of Title 33, United States Code Annotated, and in an action pursuant to the same statute, The Wearpool, 112 Fed. (2) 245, 246, the Circuit Court of Appeals of the Fifth Circuit confirmed the findings of the Court below and stated:

" 'It is elementary that it is the duty of a vessel to provide a reasonably safe place for longshoremen to work and reasonably safe means of access to the part of the ship in which they are to perform their duties. The evidence in the record supports the findings of facts by the District Judge and we concur in his conclusion as to the liability of the vessel * * * '

"Among the findings in this case are the following:

" 'Finding 8. That wheat was loaded on the vessel Golden Gate at Tacoma, Washington, prior to the time she arrived in Seattle on June 28, 1953, and that the presence of wheat dust and wheat kernels on the surface of the 'tween-deck where plaintiff sustained his injuries was known or should have been known to the defendants, its officers, agents or employees.

" 'Finding 9. The plaintiff's said fall and injuries resulting therefrom were due to the negligence and carelessness of the defendant in failing to provide plaintiff with a safe place in which to work in that the surface of the 'tween-deck was rendered slippery by the presence thereon of wheat dust and kernels of wheat causing plaintiff to slip and fall as aforesaid. That the presence there of such debris—wheat dust and wheat kernels—was unknown to the plaintiff prior to his said fall and the slippery condition of the said surface was due to the negligence and carelessness of the defendant.

"'That plaintiff's fall and injuries resulting therefrom were occasioned solely by reason of the negligence of the defendant.

"'That at all of said times the plaintiff exercised due caution and that no negligence on the part of the plaintiff contributed to his fall or the resulting injuries therefrom.'

"The above and other findings are amply supported by the evidence.

"Judge Hawley of the Nevada District, speaking for the Circuit Court of Appeals, Ninth Circuit, in The Joseph B. Thomas, 86 Fed. Rep. 658, 660, in a case where the relationship of the parties was identical to that here, stated:

"'What are the principles of law applicable to this case?

"'1. What duty did appellants owe to appellee? Their duty was to provide him a safe place in which to work, and to exercise ordinary and due diligence and care in keeping the premises reasonably secure against injury or danger. This is the pith and substance of all the decisions upon this subject as expressed in the great variety of cases, each having reference to the special facts and surroundings of the evidence relating thereto. * * *'

"In the recent case Lahde v. Soc. Armadora del Norte, a Corporation, 220 Fed. (2), 357, 361, the Court of Appeals of the Ninth Circuit reaffirmed the Thomas case, supra, in its holding that a ship owner has to invitee stevedores, as to its sailors, the duty to furnish a safe place to work, and that duty is non-delegable.

"The framers of the Complaint here commingled a claim for damages based upon negligence with a claim

based upon the alleged unseaworthiness of the vessel. These claims were not separately stated as in the complaint in Daniels v. Pacific-Atlantic Steamship Company, 120 F. Supp. 96 (D.C.E.D. N.Y.). The findings in the present case if not adequate on the question of unseaworthiness are sufficient as to negligence, and the effect given by this Court of such findings find support in Lahde v. Soc. Armadora del Norte, supra, and is Pope & Talbot v. Hawn, 346 U. S. 406, 413, where the Supreme Court of the United States held the plaintiff, not being a seaman, is not barred by the Osceola, 189 U. S. 158, from maintaining a negligence action against the shipowner, saying:

> " 'The fact that "Sieracki" upheld the right of workers like Hawn to recover for unseaworthiness does not justify the argument that the Court thereby blotted out their long recognized right to recover in admiralty for negligence.'

"Unlike the facts in Daniels v. Pacific-Atlantic Steamship Company, supra, there is evidence here that the wheat dust and wheat kernels were present on the surface of the 'tween-deck for a considerable length of time prior to the accident.

"The Court sees no merit in the contention that the amount of damages awarded is excessive.

"The Motion for New Trial is denied upon all the grounds urged." (R. 46)

## QUESTION PRESENTED

Should this Court decide the facts differently than the trial court that heard and saw the witnesses?

## ARGUMENT

### A Court of Appeals Is Not Set Up to Weigh Facts. Its Function Is to Review Errors of Law.

The court below, in the person of an able and experienced trial judge, with due deliberation weighed all of the pertinent facts developed at the trial, the objections of the appellant were answered and findings were carefully prepared.

In essence, the court found two facts which have aggrieved appellant:

1. That appellant was negligent (R. 26, 46).
2. That appellee was damaged in the amount of $22,-300.00 (R. 27, 46).

This naturally brings up questions regarding the weight and conclusiveness to be accorded findings of fact by a trial court. This Court recently was called upon to review an award of damages in relation to their amount as in this present appeal. *Veelik v. Atchison, Topeka & Santa Fe Railway Co.,* 225 F.2d 53 (9th Cir.) The Court pointed out that a different amount:

> "might have been justified on the evidence."

But this Court refused to overturn the factual amount determined in the court below and went on to emphatically state:

> "Finally, this Court is set up to review errors of law."

Older cases from this Ninth Circuit have been equally emphatic. *Empire State-Idaho Min. & D. Co. v. Bunker Hill & S. Min. & C. Co.,* 114 Fed. 417 (9th Cir.):

> "Where a case is tried by the court without a

jury, its findings upon questions of fact are conclusive in the appellate court."

*Ware v. Wunder Brewing Co. of San Francisco, et al.*, 160 Fed. 79 (9th Cir.):

"It is well settled that the appellate court cannot weigh the evidence, but must take the facts as found by the court below."

Even in admiralty appeals this Court no longer considers the fact of negligence as a proper subject for a *de novo* inquiry. *City of Long Beach v. American President Lines, Ltd.*, 223 F.2d 853 (9th Cir.):

"The first big issue is negligence. The ghost of trial *de novo* in this intermediate appellate court has been laid to rest with finality in *McAllister v. United States*, 348 U.S. 19, 75 S.Ct. 6."

So it is to be seen that the findings of fact of the trial court should not be disturbed unless there is no evidence at all to support them.

**The Trial Court's Finding of Negligence Is Supported by the Evidence.**

Appellant in its brief admits that appellee was furnished by the shipowner with an unsafe place to work. But it says that the evidence doesn't show that the shipowner had any notice of the unsafe condition, and therefore, the doctrine of transitory unseaworthiness should apply (Appellant's brief, page 14):

"The doctrine should have been applied by the lower court."

The brief of appellant defines transitory unseaworthiness as transitory unsafe conditions (Appellant's brief, page 4):

> "which render the particular area in question an unsafe place to work."

The trial court on the other hand expressly found that the presence of the unsafe condition was known or should have been known by appellant (R. 26, 46).

The appellee in his complaint (R. 5) charged both unseaworthiness and negligence, and in consequence, the trial court was free to find either or both on the part of the shipowner. *Pacific Far East Lines, Inc., v. Williams,* 234 F.2d 378 (9th Cir.):

> "The jury was not unwarranted in finding unseaworthiness or negligence or both, on the part of the shipowner."

As it turned out in the present case, the court found negligence and the appellant has found unseaworthiness. But appellant claims non-liability because the unseaworthiness was "transitory."

It is beyond dispute that an unsafe condition can be unseaworthiness and be the result of negligence at one and the same time. In such a situation it is unimportant upon which ground recovery is based insofar as a stevedore is concerned. If there is no longer any doctrine of transitory unseaworthiness, then the "unsafe condition" admitted by appellant becomes plain, ordinary unseaworthiness. In such event, the appellee is entitled to recover regardless of notice upon the part of the shipowner, because unseaworthinss is a species of liability not based on fault as is negligence. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872.

This poses the question as to whether there still is a doctrine of transitory unseaworthiness. Appellant has

cited in its brief, cases which allegedly follow the so-called *Cookingham* doctrine (*Cookingham v. United States,* 184 F.2d 213), in which the supposed doctrine of transitory unseaworthiness was evolved. None of such cases is cited which is later than the decision in *Poignant v. United States,* 225 F.2d 595 (July 22, 1955).

The Second Circuit absolutely repudiated the *Cookingham* doctrine in the *Poignant* case. The concurring opinion in referring to the *Cookingham* distinction said:

> "I think that distinction directly at odds with the Supreme Court's decision, I read my colleagues' opinion as repudiating it also."

The main body of the opinion went on to say:

> "We now come to the main problem of this case. Did the presence of an apple peel on the floor of a public corridor in the vessel constitute an unseaworthy condition, for the harmful effect of which the owner is absolutely liable to a member of the crew? As to this, there have been a number of cases involving transitory substances temporarily in the vessel and the cause of harm, in which it was held that there was no breach of the warranty of seaworthiness. *Cookingham v. United States,* 3 Cir. 184 F.2d 213; *Adamowski v. Gulf Oil Corp.,* D.C., 93 F.Supp. 115, affirmed 3 Cir., 197 F.2d 523; *Daniels v. Pacific-Atlantic S. S. Co.,* D.C. E.D. N.Y., 120 F.Supp. 96; *The Seeandbee,* 6 Cir., 102 F.2d 577.
>
> "The *Petterson* case (*Petterson v. Alaska S. S. Co.,* 9 Cir., 205 F.2d 478, 347 U.S. 396) later decided, makes it plain that the results reached in this line of cases cannot be justified by the mere fact that the existence of such a condition was not

brought to the knowledge of the owner or that he lacked opportunity to prevent or correct the condition."

Our own Ninth Circuit Court of Appeals has recently said this about *Cookingham. Pacific Far East Lines v. Williams,* 234 F.2d 378 (9th Cir.):

> "Appellant, citing *Cookingham v. United States,* 3 Cir., 184 F.2d 213, argues that the presence of ice in the area or the slippery condition of the coaming was a 'transitory' condition, not constituting unseaworthiness or negligence on the part of the ship. Assuming the doubtful proposition that the Cookingham holding is recognized in this Circuit as persuasive authority, we see no analogy between it and the case before us. In Cookingham, the injured seaman, a cook, slipped on some 'jello' while going down a stairway. There was no evidence tending to connect the ship with the presence of the jello on the stairway."

It is not, however, important to the decision of this present cause to determine whether *"Cookingham"* still lives in the law. Because, there is ample evidence in the record to demonstrate that the appellants' liability can be supported by the negligence as found by the trial court.

The present case bears a striking similarity to *Palazzolo v. Pan-Atlantic S. S. Corp.,* 211 F.2d 277 (2d Cir.), which was affirmed in *Ryan Co. v. Pan-Atlantic Corp.,* 350 U.S. 124, 100 L.ed. 133, 76 S.Ct. 232. In the *Palazzolo* case the vessel was loaded in one port (Georgetown) by the same contracting stevedore company, which hired the plaintiff as a longshoreman when the vessel arrived in New York.

Likewise in the present case, the same contracting stevedore loaded the vessel in the Port of Tacoma (R. 91-93). When the ship arrived in Seattle, the appellee was hired as a longshoreman to go aboard her. He did not know where the vessel had come from except that (R. 59):

> "She had come from sea. I don't know what port."

In the *Palazzolo* case the longshoremen in the port of Georgetown presumably failed to properly shore-up cargo in one of the holds, before the hatch was covered for the voyage to New York. This was evidenced by the fact the cargo arrived improperly stowed in New York. In this case, the supercargo William Dibble testified that it was standard procedure for the stevedores to clean the deck in the No. 7 hold after loading in Tacoma. However, he testified that he didn't recollect seeing them do it on this occasion (R. 91). Here, as in the *Palazzolo* case, the court could readily find from the evidence that the stevedores had failed to clean the deck in Tacoma because when she arrived in Seattle the deck was in an unsafe condition.

Under these facts the court in the *Palazzolo* case held there was ample evidence to find against the ship on either or both negligence or unseaworthiness. The court said as follows:

> "Defendant-appellant, Pan-Atlantic, has argued that, since Ryan Stevedoring Company created the hazardous condition by improperly stowing the cargo in Georgetown, South Carolina, Pan-Atlantic should not be held liable to plaintiff. We cannot agree. Not only did defendant owe the duty to provide a seaworthy ship on which plaintiff-stevedore

might work, *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1099, but it owed him, as a business visitor or invitee, the duty to provide a reasonably safe place to do his work. *Fodera v. Booth American Shipping Corp.,* 2 Cir., 159 F.2d 795. This duty was non-delegable. *Vanderlin v. Lorentzen,* 2 Cir., 139 F.2d 995, 997. Since it is reasonably foreseeable that improper stowage must result in rolls of pulp sliding or 'jumping' and striking someone, the ship would be liable for this accident if the jury found as it did here, that the accident resulted from improper stowage. *La Guerra v. Brasileiro,* 2 Cir., 124 F.2d 553. Proper stowage is an element of seaworthiness. *Pioneer Import Corp. v. The Lafcomo,* 2 Cir., 138 F.2d 907. There was ample evidence to support a jury verdict on either or both negligence or unseaworthiness. * * * (4) Nor does defendant's "surrender-of-control" argument compel a different result. Assuming *arguendo* defendant did surrender control of the Canton Victory to Ryan for loading in Georgetown, Pan-Atlantic reassumed control of the ship upon completion of the stowage operation, and operated it for some three or four days until its arrival in New York. At the time of discharge of cargo, the duty to the stevedore arose and Pan-Atlantic, in control of its ship, was obligated to provide the stevedore with a safe place to work and a seaworthy vessel."

This case also bears a similarity to *Lahde v. Soc. Armadora Del Norte, a corporation,* 220 F.2d 357, (9th Cir.). In the *Lahde* case, like the present case, the injury was caused by an unsafe condition on the 'tween deck which existed when the vessel came to port, and the injured longshoreman entered the hatch for the first

time. Here this Court held that it is immaterial whether the shipowner knew of the dangerous condition because when a stevedore is invited aboard a vessel, the shipowner owes him a non-delegable duty to provide him a safe place in which to work.

The record in this appeal shows that appellee was the first man to descend the ladder to the 'tween decks (R. 50, 61). The ladder covered a distance of about twenty feet between two decks (R. 77). In looking down from the top of the ladder, no evidence of any dangerous condition was apparent to appellee (R. 62, 78). In descending the ladder which was welded to the after-end of the hatch, the appellee was, of course, obliged to make use of his hands and feet. This required him to be in a position of facing the ladder during his descent (R. 61). After reaching the 'tween decks at the bottom of the twenty-foot ladder, the appellee turned and just as he took a bare step or two, he was caused to violently fall and injure himself by reason of an extremely slippery and hazardous condition of the deck caused by a thick coating of wheat dust in which there was a liberal scattering of wheat kernels (R. 51, 61). In fact, the deck was found to be in such a slippery and dangerous condition that the men were unable to work until it was cleaned up (R. 53, 61, 62, 63).

The injury to appellee was obviously caused solely and proximately by the dangerous and hazardous condition of the deck. The vessel was a foreign ship of Swedish ownership (R. 59). She had a crew aboard her (R. 60). The crew had the duty of keeping the ship's decks clean and safe for travel (R. 95). The ship had

been partly loaded in Tacoma prior to her arrival into Seattle (R. 91). The officers and crew of the vessel had the primary and non-delegable duty of seeing that the decks of the vessel were kept in a safe condition. They had ample opportunity to inspect the decks during and after the completion of the loading operations in the port of Tacoma. They had full control of the ship during its voyage to Seattle. They had ample opportunity to inspect the vessel's decks before inviting the stevedores aboard in the port of Seattle. If through their own negligence none of the ship's personnel actually saw the unsafe condition, they are surely charged with constructive notice of it, because, the record is plain that the ship's personnel had every opportunity to ascertain the dangerous and unsafe condition of the 'tween deck prior to the time appellee was injured upon it.

Additional cases in point are as follows:

*States S. S. Co. v. Rothschild International Steve. Co.*, 205 F.2d 253 (9th Cir.):

> "The absolute duty of a shipowner to provide a safe place for longshoremen to work may be likened to the absolute duty of a landowner to keep his premises in such condition that passers-by are not injured."

*Kreste v. United States*, 158 F.2d 575:

> "1. That respondent was under a duty to provide libelant with a safe place to work. 2. That respondent violated its duty in that it neglected and carelessly caused, allowed and permitted oil and grease to collect upon the deck of said vessel."

*The Joshua W. Rhodes,* 259 Fed. 604:

"The contractor was not informed of the danger of flaxseed scattered on the deck, and hence was not responsible for its condition at the time of the accident, the duty of furnishing a reasonably safe place in which to work resting upon the steamship alone. In establishing responsibility for the injury, the question to be decided is whether, in leaving scattered flaxseed on her deck, the steamship complied with her duty to libelant to furnish a proper and reasonably safe passway for his use in the performance of his work * * *. Even a small quantity of flaxseed lying on a steel deck concededly makes the deck slippery and dangerous; one witness testifying that it would make it as slippery as though covered with ice. * * * Failure to clean up the deck, knowing there was flaxseed upon it rendered the vessel liable. Libelant did not see the patch of flaxseed upon which he slipped until nearly a foot from it, and even though he would not have stepped on it had he sooner perceived it, he cannot be held negligent for not stepping aside more quickly."

*Munson S. S. Lines v. Newman,* 24 F.2d 417:

"It is the duty of the ship initially to exercise due diligence to furnish the stevedore with a safe place to work, and she cannot escape liability by showing that a competent stevedore was employed at the loading port when the accident occurs in unloading."

*Mollica v. Chilean Line,* 107 F.Supp. 316:

"If, as the jury must be taken to have found, control over the hold vested in the ship immediately prior to the time plaintiff came to work, then he was entitled, under the warranty of seaworthiness, to commence work in a hold that was safe."

*Mollica v. Compania Sud-American De Vapores*, 202 F.2d 25:

> "Since *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.ed. 1099, the duty of a shipowner to provide an initially seaworthy ship cannot be questioned."

**The Findings of the Trial Court on Damages Are Supported by the Evidence.**

The ascertainment of the degree of injury and the assessment of damages is a function peculiarly in the province of the trier of the facts. Here the trial judge had the opportunity of personally seeing the appellee and hearing his testimony and the testimony of the other witnesses. In such cases, the result should be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by the law to ascertain what is just compensation for the injuries inflicted. This rule was announced in the *City of Panama*, 101 U.S. 453, 464, 25 L.ed. 1061:

> "When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution, but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injuries inflicted."

The court below in the case now before this Honorable Court, gave particular attention to the subject of injury and damages and discussed them with great thoroughness (R. 16 to 22). Instead of acting in a manner "to shock the conscience" as alleged by the appellant, the

trial judge conducted himself as did the district judge described in *United States v. Puscedu*, 224 F.2d 5:

> "The district judge fully realized the difficult and delicate nature of the problem he was confronted with, to make libellant as nearly whole as a just and fair financial award could do it. He conscientiously assumed and painstakingly discharged his burden, and in a carefully considered opinion, canvassing all the relevant considerations, making all due allowances for conflicting points of view, and giving his reasons for doing so, determined what a fair award should be."

The appellant has attempted to make a play upon the earnings of the appellee. Appellant's conflicting points of view were adequately answered by the trial judge by his Opinion (R. 20), in which the court pointed out that at the time of the injury, appellee was only an extra longshoreman and that he was later advanced to the fully registered board where his job opportunities increased. The record clearly shows appellee by reason of his injury, has been greatly handicapped in earning a livelihood in that his injuries prevent him from earning as much as the other longshoremen (R. 37, 39, 40, 74, 75) and that he has lost the wages stated.

No two cases of personal injury are exactly alike in respect to the damage that they cause to the individual. It is, therefore, futile to cite awards in other cases. The assessment of damages is not a matter of mechanical computation. It is matter solely within the broad understanding of the trier of the facts. In the *Puscedu* case *supra*, the court admonished against

> "treating the admeasurement of damages as a more or less mechanical matter, rather than as it is, a

> matter requiring a broad understanding and the exercise of informed judgment."

There is further, no fixed standard to measure compensation for pain and suffering. This likewise is a matter that should be left to the trial judge who heard and saw the injured party. As this Court said in *United States v. Luehr,* 208 F.2d 138 (9th Cir.):

> "Such computations necessarily involves a high degree of speculation, but there are aspects of the situation on which one need not speculate. The court judicially knows that the value of the dollar continues to decline and that wages, including the wages of longshoremen, steadily pursue their ascending spiral. * * * We know of no standard by which to measure compensation for pain and suffering. On the whole we are not persuaded that the trial court's award is excessive."

Positive medical testimony was given by Dr. Bernard A. Gray, orthopedic specialist and member of the staff of the University of Washington Medical School (R. 66), in reference to the condition of appellee. He said:

1. Pain on forced motion of wrist (R. 69).
2. Pain in lifting (R. 68).
3. Pain on any exertion (R. 68).
4. That this condition is stationary (R. 69).
5. Limitation of range of motion (R. 69).
6. That the stiffness of the wrist is permanent (R. 69).
7. Constant swelling in the wrist (R. 68).
8. Lump on back of wrist which could be made to enlarge by bending the hand down (R. 69).

9. Increased exertion causing wrist to swell because irritation creates fluid (R. 70).
10. Heavy work causes increase of trouble (R. 70).
11. That exertion will cause an aggravation necessitating surgery (R. 69).
12. That the function of the right wrist has been permanently limited (R. 71).
13. That surgery cannot fully restore use (R. 69).
14. Permanent disability between 15 and 20 per cent as compared with amputation of the right hand (R. 71).

Appellee makes his living with his hands. He is trained for no other gainful work except that of the hard and arduous exertion of lifting cargo, and hauling on lines in his occupation of stevedore and seaman. The most useful tool in the accomplishment of his life's work—his own right arm, has been permanently impaired in its usefulness. The record has shown that he is frequently obliged to refrain from work because of the increased disability which follows the exertion necessary to his trade and calling. This condition is permanent. Pain is his constant companion for the rest of his natural life.

There is adequate evidence in the records to support the findings of fact by the trial judge in respect to damages. The rule of adhering to findings of fact in respect to damages by a trial judge should be followed when supported by evidence. If the rule were otherwise, the awards of trial courts would be advisory only and the ultimate responsibility of fixing damages would vest in the appeal tribunals.

## CONCLUSION

Appellee respectfully submits that the trial judge made careful findings of fact based upon substantial evidence, and asks that the decree and judgment of the court below be affirmed.

Respectfully submitted,

ZABEL & POTH
*By* PHILIP J. POTH
*Attorneys for Appellee.*

No. 15245

# United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of Yuba Livestock Auction Company,

Appellees.

# Transcript of Record

Appeal from the United States District Court for the Northern District of California Northern Division.

FILED

DEC 11 1956

PAUL P. O'BRIEN, CLERK

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—12-7-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]


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In the United States District Court for the Northern District of California, Northern Division

Civil No. 7124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of YUBA CITY LIVESTOCK AUCTION COMPANY,

Defendants.

COMPLAINT FOR CONVERSION OF STOCK MORTGAGED TO FARMERS HOME ADMINISTRATION

Comes Now the United States of America and complains of the defendants and for cause of action alleges:

I.

That this is a suit of a civil nature brought by the United States of America, and jurisdiction of this Court arises under the provisions of Section 1345 of Title 28 of the United States Code.

II.

That defendants reside in the Northern Division of the Northern District of California within the jurisdiction of this court; and that at all times referred to in this complaint defendants did business in the Northern Division of the Northern

District of California, operating a livestock auction company under the firm name and style of Yuba City Livestock Auction Company.

III.

That a crop and chattel mortgage was executed to plaintiff for value by one Allan W. Wheaton, hereinafter referred to as mortgagor; that said mortgage was dated March 17, 1951, and was recorded on March 17, 1951, in Volume 158, page 353, Official Records of Yuba County, California; that said mortgage covered certain livestock, therein described, and also contained a clause making it applicable to all livestock then owned or which might be thereafter acquired by the mortgagor during the time the mortgage was effective; and that said mortgage provided that the mortgagor should not sell the mortgaged property without the written consent of the mortgagee and provided further that if the mortgagor should fail to comply with any of the mortgage covenants the mortgagee might foreclose the mortgage immediately by taking possession of the mortgaged property and selling the same at private sale or at public auction and applying the proceeds against the indebtedness secured by the mortgage.

IV.

That between the dates of November 19, 1951, and March 2, 1953, inclusive, said mortgagor, in total disregard of the mortgage described in paragraph III hereinabove, wrongfully and fraudulent trans-

ferred and delivered to defendants certain livestock hereinafter described, which livestock was covered by said mortgage; that defendants, likewise in total disregard of said mortgage, wrongfully marketed said heifers through their livestock auction yard, thereby converting said livestock to their own use and purposes; and that said livestock, the value thereof, and the dates of each sale are shown in the following table:

| Date | Description | Weight In Pounds | Net Sales Price |
|---|---|---|---|
| 11-19-51 | 3 red butcher hogs | 640 | $ 111.74 |
| 11-26-51 | 1 Guernsey cow | ...... | 276.07 |
| 12- 3-51 | 1 Guernsey cow | ...... | 280.92 |
| 8-25-52 | 3 feeder pigs | ...... | 27.64 |
| 9- 8-52 | 3 fat hogs | 505 | 97.97 |
| 9-29-52 | 1 red sow | 485 | |
| | 1 red fat hog | ...... | 103.67 |
| | 1 lamb | 95 | |
| 10 -6-52 | 3 fat hogs | 585 | 119.16 |
| 10-13-52 | 2 fat hogs | 340 | 59.36 |
| 11- 3-52 | 1 large sow | 215 | 87.45 |
| | 1 fat hog | 340 | |
| 11-10-52 | 1 red butcher stag | 400 | 36.86 |
| 2- 2-53 | 5 fat hogs | 920 | 183.83 |
| 3- 2-53 | 2 fat hogs | 410 | 141.55 |
| | 1 red sow | 235 | |
| | Total | | $1,526.22 |

V.

That by reason of said wrongful and fraudulent transfer and delivery of said livestock by said mortgagor to the defendants, plaintiff became entitled to the immediate possession of said livestock and

was entitled to sell such livestock at private sale or at public auction and apply the proceeds in discharge of the indebtedness secured by the above-described mortgage.

VI.

That plaintiff has never released its lien on the above-described livestock nor has it ever consented to the sale of said livestock by said mortgagor.

VII.

That no part of the proceeds of the sale of said livestock was paid to the plaintiff to be applied on the indebtedness secured by the aforesaid mortgage; and that there is still owing to plaintiff on the account of said mortgagors an amount in excess of the value of the livestock converted by defendants and that mortgagor does not have sufficient assets to repay said indebtedness.

VIII.

That demand has been made by the plaintiff upon the defendants for the payment of the value of the aforesaid converted livestock, but that to date defendants have failed and refused to reimburse the plaintiff.

Wherefore, plaintiff prays that judgment be entered against said defendants for the sum of One Thousand Five Hundred Twenty-six and 22/100 ($1,526.22), plus interest since the dates of conversion, and for costs of this action, and plaintiff prays

for such other and further relief as to this Court may seem just and proper.

LLOYD H. BURKE,
United States Attorney;

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

[Endorsed]: Filed September 30, 1954.

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[Title of District Court and Cause.]

## AMENDED ANSWER

Now Come the Defendants, Henry W. Matthews and Nettie Matthews, doing business under the firm name and style of Yuba City Livestock Auction Company, and in answer to the complaint admit, deny and allege as follows:

I.

Answering Paragraph III, Defendants admit the allegations contained in said paragraph down to and including the word "described" in line 8, and admit that portion commencing with the word "and" in line 11 and continuing thence to the end of said paragraph.

Answering the intermediate portion of said paragraph, that is to say, the portion commencing with the word "and" in line 8 and ending with the word "effective" in line 11, Defendants admit that Plaintiff's chattel mortgage contained a provision pur-

porting to make it applicable to all livestock then owned or which might thereafter be acquired by mortgagor during the time Plaintiff's said mortgage was effective, but deny that said provision was or is legally sufficient or enforceable; and allege in this connection that following the recordation of Plaintiff's said mortgage, the mortgagor, A. W. Wheaton, gave to one Fritz Ruff a chattel mortgage on 150 pigs, including 19 sows and the natural increase thereof, all located in Yuba County, which said mortgage was a purchase money mortgage and was recorded in Volume 158 of Official Records at page 23, Yuba County Records, on November 5, 1951; that said last-mentioned mortgage was in effect throughout the entire period of livestock sales made by Defendants for said mortgagor and complained of by Plaintiff in its complaint herein.

II.

Answering Paragraph IV, Defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of the initial averments thereof extending down to and including the word "mortgage" in line 24; deny that portion reading as follows: "that Defendants likewise, in total disregard of said mortgage, wrongfully marketed said heifers through their livestock auction yard, thereby converting said livestock to their own use and purposes"; admit that Defendants made the livestock sales listed in the table which forms the concluding portion of said paragraph.

III.

Answering Paragraph V, Defendants deny any wrongful or fraudulent act on their part as stated in the first and second lines of said paragraph; allege that they have no knowledge or information sufficient to form a belief as to the truth of the remainder of said paragraph.

IV.

Answering Paragraph VI, Defendants allege that they have no knowledge or information sufficient to form a belief as to the truth of said paragraph.

V.

Answering Paragraph VII, Defendants deny that they converted any livestock to Plaintiff's detriment as alleged in the 5th line of said paragraph; allege that they are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in said paragraph.

VI.

Answering Paragraph VIII, deny that the livestock were converted by Defendants as alleged in the second line of said paragraph; admit the remaining allegations contained in said paragraph.

Further Answering Said Complaint, Defendants allege that upon the written, signed authorization and request of mortgagor, wherein he expressly declared and guaranteed to Defendants that the livestock in question were free and clear of all liens, mortgages or other encumbrances, they sold in good

faith through the facilities of their licensed auction yard, situated at Yuba City, in the County of Sutter, the livestock listed and described in Paragraph IV of the complaint without notice of Plaintiff's chattel mortgage or claim thereon; that Defendants deducted and retained their regular commission of three (3%) per cent on the gross sales and their actual and necessary sales expenses, remitting the net returns to A. W. Wheaton.

By Way of Further Answer, Defendants allege that the complaint fails to state a claim against Defendants upon which relief can be granted.

Wherefore, Defendants pray that this action be dismissed and that they have their costs incurred herein.

WEIS & WEIS,

By /s/ ALVIN WEIS,

Attorneys for Defendants.

Duly verified.

[Endorsed]: Filed April 25, 1955.

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[Title of District Court and Cause.]

## OPINION

Murphy, District Judge.

This is an action for conversion brought by the United States against Henry W. Matthews and Nettie Matthews, doing business as Yuba City Live-

stock and Auction Company. Jurisdiction is derived from 28 U.S.C. 1345.

On March 17, 1951, one Wheaton executed a crop and chattel mortgage to the Farmer's Home Administration, an agency of the plaintiff. The mortgage covered farm implements, machinery, and certain livestock specifically listed, as well as after-acquired livestock and property. It contained the usual provision that upon default, the mortgagee was entitled to immediate possession of the mortgaged goods. The mortgage was duly recorded on March 17, 1951, in Yuba County, the county in which Wheaton then resided and in which the property in question was then located.

On November 19, 1951, Wheaton defaulted on his obligations to the plaintiff and remained in default from that date until March 2, 1953. During the period in which he was in default, November 19, 1951, to March 2, 1953, Wheaton fraudulently removed, from time to time, certain of the livestock mortgaged to plaintiff and took them to Sutter County, where the defendants' business is located. Wheaton there had defendants sell the livestock at auction in the regular course of their business and turn the proceeds, less commission, over to him. Defendants did so, after obtaining Wheaton's signed assurance and warranty that the animals were free and clear of all liens or other encumbrances, including mortgages. There is no question regarding defendants' state of mind. They at no time during the relevant period had knowledge of plaintiff's

claim or interest in the livestock. Nor is there any question of negligence by reason of facts which might have alerted them to the possibility that the goods were mortgaged to the plaintiff.

Defendants sold the animals for a total of $1,526.22. From this sum, they subtracted their regular sales commission of 3% plus all expenses of the sale, and turned the net proceeds over to Wheaton.

On September 30, 1954, the United States brought this action for conversion against the defendants. The question presented is whether an auctioneer is liable in conversion to a mortgagee with a right to possession, where the auctioneer without knowledge of the mortgage in default, and in the absence of other facts which would alarm the reasonably prudent man to such a state of the title, sells goods presented to him in the ordinary course of business by the mortgagor in possession, and turns the proceeds over to that mortgagor.

The cases are quite numerous which have held auctioneers liable in conversion for selling mortgaged or stolen property, but only a few deal with the precise issue here presented. In considering that issue, therefore, we must leave aside the cases holding the auctioneer liable for selling the mortgaged or stolen goods with knowledge of the interest of the true owner in the goods, such as Dixie Stock Yard v. Ferguson, 192 Miss. 166, 4 So. 2d 724 (1941); Green v. Crye, 158 Tenn. 109, 11 S.W. 2d

869 (1928), and Forbush v. San Diego Fruit & Produce Co., 46 Idaho 331, 266 P. 659 (1928). In cases such as those, the rationale of the rule holding the auctioneer liable is easy to perceive and eminently just. Once the auctioneer is informed that the title in the property he is about to sell is in dispute, he acts at his peril in persisting in the sale. If he pays the proceeds to the wrong party after having been alerted to the disputed ownership, he should undoubtedly be held liable to the rightful owner. That principle was all that was involved in those cases. Whatever else may have been said there on either side of the question now before the court was dictum only.

Plaintiff further contends that the defendants in the case at bar had "constructive notice" from the proper recordation of the mortgage, and should therefore be held liable. This argument is entirely unfounded. The effect of recordation statutes of the type of that here involved, Cal. Civ. Code sec. 2957, is clearly limited to purchasers and creditors or other encumbrances, and has been held uniformly not to be applicable to auctioneers without a property interest in the goods. First National Bank of Pipestone v. Siman et al., 65 S. D. 118, 275 N. W. 347 (1937); Frizzell v. Rundle, 88 Tenn. 396, 12 S. W. 918 (1890); Greer v. Newland, 70 Kan. 315, 78 P. 835 (1904); Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419 (1894). The California cases, discussed below, do not even trouble to refute the suggestion of "constructive notice" to an otherwise innocent auctioneer on the basis of the recording

of a mortgage. The fact of recording, therefore, is irrelevant to our inquiry, and does not require further discussion.

We come now to the cases directly in point, holding the auctioneer liable in conversion although his payment of the proceeds to the mortgagor in possession was innocent and reasonable. The latest of these that has been found is First National Bank of Pipestone v. Siman, et al., 65 S. D. 118, 275 N. W. 347 (1937). In that case, commission merchants sold sheep in the course of their business, and paid the proceeds over to the mortgagee, unaware that the mortgage was in default. They were held liable in conversion to the mortgagee. The court cited, as does the plaintiff here, the Restatement of Agency, Section 349 of which reads as follows:

> "An agent who does acts which would otherwise constitute conversion of a chattel is not relieved from liability by the fact that he acts on account of his principal and reasonably, although mistakenly, believes that the principal is entitled to possession of the chattels."

The court then cites (at 275 N. W. 349) a number of cases in support of the application of this principle to auctioneers without notice. The cited cases include Greer v. Newland, 70 Kan. 310, 77 P. 98 (1904), and Forbush v. San Diego Fruit & Produce Co., 46 Idaho 231, 266 P. 659 (1928). The citation in the Greer case refers to the first hearing of that case in the highest court of Kansas. It was an

action in contract, not in conversion, and the auctioneers were held liable on the ground that they had had "constructive notice" by reason of the recording of the mortgage. On rehearing, 70 Kan. 315, 78 P. 835 (1904), the court held that there was no "constructive notice," and that the auctioneers could not be liable under the theory of contract, in any event. It reversed and remanded the case below. No subsequent decision is recorded. The Forbush case involved notice to the auctioneer, thus taking it out of the class of cases dealing with the principle contended for now, and raised a further question as to the interest of the auctioneers in the property itself, the court saying that the auctioneers had a status with respect to the property "not that of a mere commission merchant." (266 P. 664.)

Of the other cases cited by the court, a number squarely support the rule contended for by plaintiff here. Kearney v. Clutton, 101 Mich. 106, 59 N. W. 419 (1849), holds an innocent auctioneer liable in conversion, pointing out that the auctioneer may protect himself against such liability by requiring indemnity from the seller. Robinson v. Bird, 158 Mass. 357, 33 N. E. 391 (1893), holds an innocent auctioneer liable, without discussion. Spraights v. Hawley, 39 N. Y. 441, 100 Am. Dec. 452 (1868), holds the auctioneer liable as an agent of a converter, assisting in the conversion. Wing v. Milliken, 91 Me. 387, 40 A. 138 (1896), is a more doubtful case, for the reason that the defendant there may have been something more than an auctioneer or

commission merchant acting in the regular course of his business.

Many of the cases holding the innocent auctioneer liable make reference to the early New York case of Hoffman v. Carow, 22 Wend. 285 (N. Y. 1839). That interesting case, dealing with the liability in conversion of an innocent auctioneer, for the sale of stolen goods, was decided by a vote of fifteen Senators and the Chancellor against the votes of five Senators. Three opinions were written for the majority, holding the auctioneer liable although innocent. The Chancellor's opinion, at 22 Wend. 293, treated the case as one of the rights of true owner and purchaser in stolen property, and showed that under the English law the doctrine of market overt did not bar a suit to recover stolen property from the innocent purchaser. Senator Edwards, also for the majority, seemed to assume that to hold for the auctioneer would be to deprive the rightful owner of his remedies against all others, including the purchaser, again under the doctrine of market overt. See 22 Wend. 295. Senator Verplanck, for the majority still, agrees that when the handling of the goods in question is done by "mere agents," it would be unjust to impose liability upon the "common carriers, ship masters and others, through whose hands goods feloniously or wrongfully obtained might pass." He then distinguishes the case under consideration by pointing out that the auctioneer performs the act which is the conversion of the goods into money, and that therefore he should be liable.

Thereupon, Senator Verplanck puts forward the theory which has become the modern rationalization of the rule, despite its conceded harshness:

> "In this instance the rule falls hardly upon innocent and honorable men; but looking to general considerations of legal policy, I cannot conceive a more salutary regulation than that of obliging the auctioneer to look well to the title of the goods which he sells, and in case of feloniously obtained property, to hold him responsible to the buyer or the true owner, as the one or the other may happen to suffer. Were our law otherwise in this respect, it would afford a facility for the sale of stolen or feloniously obtained goods, which could be remedied in no way so effectually as by a statute regulating sales at auction, on the principles of the law as we now hold it." 22 Wend. 319, 320.

The minority in Hoffman was represented by a vigorous dissent by Senator Furman. After examining the precedents upon which the majority rely and pointing out that they do not extend to the case of an auctioneer entirely innocent of knowledge, Senator Furman examines the policy reasons tendered by Senator Verplanck, and comes out at an opposite conclusion. He warns that the doctrine of the majority would tend to destroy the useful function rendered by auctioneers to the community of farmers and planters. 22 Wend. 307. He further challenges the proposition that the auctioneer plays a

role so vital to the conversion of the property as to require his liability, saying:

> "The only ground upon which a party should be held liable, is that he has the property or its value in his possession, or has with knowledge or under notice, illegally disposed of it; and not by reason of having been the mere conduit for its transmission from one to another, and that without notice or knowledge of any claim having been set up to the property by a third person." 22 Wend. 308.
>
> "An auctioneer does not claim the goods as his own, or assume any right in or over or to dispose of the same as his own property. It is true he has a special interest in goods sent to him to be sold, and a lien on them, or their proceeds, for duty payable to the State; he may sue the buyer for the purchase money; and is responsible to the vendee for the fulfillment of the contract of sale unless he discloses the name of his principal at the time of sale; yet, for all other purposes, he is the mere agent for the transmission of goods from one set of traders to another." 22 Wend. 313.

Senator Furman also points to the injustice of imposing liability upon persons who are without fault or moral blameworthiness, arguing that the element of intent, or scienter, should be considered in this situation as it is in other areas of the common law, such as fraud. 22 Wend. 313.

The basic considerations of policy put forward by Senator Verplanck, for liability, and by Senator Furman, against it, have continued to be the points of subsequent discussion and decisions. The rule imposing liability was rejected first in Frizzell v. Rundle, 88 Tenn. 396, 12 S. W. 918 (1890). It has been vigorously criticized by an able commentator, who points out that it is anomalous to relieve from liability for accidental personal injury, caused without culpability, but to impose liability for accidental injury to property, also caused, or contributed to, without culpability. See 15 Harv. L. Rev. 335, 346 (1902). In addition to Frizzell, supra, a number of other states seem to have adopted Senator Furman's argument in dissent as the law of the case. See Dixie Stock Yard v. Ferguson, 192 Miss. 166, 4 So. 2d 724 (1941), (approving Frizzell, at 727, but decided on the issue of actual notice), and cf. Leuthold v. Fairchild, 35 Minn. 99, 27 N. W. 503 (1886). It may be said, in order to satisfy the Restatement, that the auctioneers in these jurisdictions are not agents of the seller for the purpose of the conversion, although they are his agents for certain other purposes. Such a restatement of the Restatement would serve only to point up the inevitable inadequacy of a single general rule to encompass the many underlying considerations involved in the issue of the auctioneer's liability.

The considerations against liability are the usefulness of the auctioneer's function, the heavy burdens involved in holding him to a search of the

seller's title, and his moral blamelessness under our set of facts. The considerations for liability are the degree of his participation in the wrongful disposition of the property, and his opportunity to act as an investigator of the seller's title. At bottom, what the jurisdictions which have rejected liability have done, is to weigh these competing considerations and decide that those against liability are the stronger ones.

On the part of the jurisdictions imposing liability, it is said in mitigation of the harshness of the rule, that the auctioneer can protect himself by checking the records of the place of origin of the property. If the auctioneer's fee were to reflect that burden, however, a substantial change in the size of the commission disclosed here would be necessary. And this would put the auctioneer at the mercy of the seller who lies to him as to the place of origin, or at the least require further investigation as to that question. It is said that the auctioneer can require indemnity of the seller, and thus protect himself. This does not strike a wholly convincing note. If the indemnity of the wrongful seller were worth anything, the auctioneer would not in most cases be in court. The rule imposing liability upon the auctioneer, viewed realistically, does more than shift the burden of suing the original wrongdoer from the true owner to the auctioneer. In effect, it shifts the loss to the auctioneer. It may be thought necessary, as a matter of policy, to add to the existing remedies of the true owner an action in conversion against the innocent

middleman. Such a rule is not without reason, but it should be adopted, if at all, with a full realization of its effects.

The California courts, after initially exempting the innocent auctioneer from liability in Rogers v. Huie, 2 Cal. 571, 56 Am. Dec. 363 (1852), have reversed their stand, and now would, without much doubt, hold the auctioneer at bar here liable. Swim v. Wilson, 90 Cal. 126 (1891)[1]; Lusitanian-American Development Company v. Seaboard Dairy Credit Corp., 1 C. 2d 121, 34 P. 2d 139 (1934).

If this case were here under diversity jurisdiction, it would end with the above conclusion, under the rule of Erie v. Tompkins, 304 U.S. 64 (1934). This case is here, however, by virtue of the jurisdiction of the federal district courts over cases in which the United States is a party. 28 U.S.C. 1345. The plaintiff is in this court pursuant to its authority to sue and be sued under 7 U.S.C. 1014, establish-

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[1]In Swim v. Wilson, 90 Cal. 126 (1891), the Court announced that the Rogers case had been "practically" overruled by the case of Cerkel v. Waterman, 63 Cal. 34 (1883). That case involved commission merchants who had been charged to sell the barley of one Wilson. By mistake, they also sold wheat belonging to the plaintiff and paid the proceeds to Wilson. As a matter of negligence, or contract, it may be clear that one man's wheat is not another's barley. It does not appear necessary, however, to import that undoubted proposition into the issue now under consideration. The Court in the Swim case went on to say that the Rogers case was in any event opposed to the weight of authority and principle. 90 Cal. 126, at 131.

ing the Farmers' Home Corporation. Under these circumstances, the law governing plaintiff's action is the common law prevailing in the federal courts when no choice of state law is indicated by Congress. Clearfield Trust Company v. United States, 318 U.S. 363 (1943). In Clearfield, a federal district court sitting in Pennsylvania had applied a Pennsylvania rule of laches to deny relief to the plaintiff, the United States, suing on some commercial paper. The Court of Appeals for the Third Circuit reversed, on the ground that Erie v. Tompkins did not apply. 130 F. 2nd 93 (3d Cir. 1942). On appeal to the Supreme Court, Mr. Justice Douglas, speaking for a unanimous Court[2] said:

> "We agree with the Circuit Court of Appeals that the rule of Erie R. Co. v. Tompkins, 304 U.S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115, 15 U.S.C. secs. 721-728. The authority to issue the check had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of

[2]Only seven members sat. Messrs. Justices Murphy and Rutledge did not participate in the case.

Pennsylvania or of any other state. * * * The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. * * * In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. * * *"

This doctrine of the federal common law is amply supported by authority. Deitrick v. Greaney, 309 U.S. 190 (1940); Board of County Commissioners v. United States, 308 U.S. 343 (1939); D'Oench Duhme & Co. v. Federal Deposit Insurance Corp., 315 U.S. 447 (1942). In the D'Oench case, Mr. Justice Jackson, in an illuminating concurring opinion, said:

"A federal court sitting in a non-diversity case such as this does not sit as a local tribunal. In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. Federal common law implements the federal Constitution and statutes, and is condi-

tioned by them. Within these limits, federal courts are free to apply the traditional common-law technique of decision to cases such as the present * * *"

"The law which we apply to this case consists of principles of established credit in jurisprudence, selected by us because they are appropriate to effectuate the policy of the governing Act. The Corporation was created and financed in part by the United States to bolster the entire banking and credit structure. The Corporation did not simply step into the private shoes of local banks." At p. 472.

It is true that Mr. Justice Jackson, in discussing the basis of jurisdiction in the D'Oench case pointed out that the statute creating the Federal Deposit Insurance Corporation, the federal agency involved in that case, contained a clause not found in the creating statute of the plaintiff now at bar, to the effect that all suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States. 12 U.S.C. 264(j). But he took care to say:

"This is not to suggest, however, that questions not specifically dealt with in these statutes cannot be federal questions simply because of the absence of an express provision that suits 'shall be deemed to arise under the laws of the United States.'" 315 U.S. 684, n. 5

If this suit were being brought in Tennessee, on the basis of the mortgage held by the Farmers' Home Corporation, and the defendant there sought to evade liability under some local theory of defense, he could not prevail if that local theory were at variance with the law of the United States as developed in the federal courts in non-diversity cases. The case is here to be determined, therefore, under the federal common law.

The federal case in point is Drover's Cattle Loan & Investment Company v. Rice, 10 F. 2d 510 (N. D. Iowa 1926), a diversity case before Erie v. Tompkins, and therefore governed by the rule of Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865 (1840), under which the federal courts were not bound to follow the judicial law of the States, and developed a body of federal decisional law. The rules of decision applicable in diversity cases under Swift v. Tyson, therefore, are the same as those applicable to non-diversity cases in the federal courts under Erie v. Tompkins, at least for present purposes. In Drover's Cattle Loan & Investment Co. v. Rice, Judge Scott carefully examined the precedents cited on both sides of the precise issue now under consideration, the innocent sale of mortgaged cattle by an auctioneer, and concluded that the rule of Frizzell v. Rundle, rejecting the auctioneer's liability, was the better rule. The opinion is predominantly concerned with the issue of "constructive notice," but Judge Scott specifically considers the rule of strict liability contended for by plaintiff here when he says:

> "Some cases cited proceed upon the theory that a mortgagor in possession, who sells the property, assumes the attitude of a thief, and that anyone meddling with the property in connection with the mortgagor assumes the same liability as though dealing with a thief. This principle, of course, 'ignores as wholly immaterial all questions of notice. I think the rule which applies to one dealing with a thief should not apply to an innocent person dealing directly with the owner rightfully in possession and without notice * * *'
>
> "I therefore find that defendants received and sold the cattle and accounted to the mortgagor for the proceeds without actual notice of plaintiff's rights, and in good faith as commission merchants. I conclude as a matter of law that in such circumstances defendants are not liable unless the South Dakota statute gives them constructive notice * * * (which it did not, Judge Scott held)." 10 F. 2d 510, at 512.

The decision of Judge Scott in Drover's governs the case at bar, and supplies us with the rule of law to be applied to it. It may be pointed out that in the usual case in which local law is held inapplicable to a federal suit, it is the United States as plaintiff which profits by the denial of a defense under local law. See, e.g., D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation, 315 U.S. 447 (1943). But the principle of the application of federal law is not in the least affected thereby. What

is sauce for the federal plaintiff as gander ought to be sauce for it when it is the goose.

I therefore conclude that the defendants, auctioneers without notice and innocent of any wrongful intent or of negligence, are not liable to the plaintiff in conversion. With respect to the amount received and retained by the defendants out of the returns of the sales, however, the matter is otherwise. This sum, a commission amounting to $46.79, or 3% of $1,526.22, was money received by the defendants for the sale of property owned by the United States and retained by them without authority or permission by the United States. The complaint of the plaintiff states an action for money had and received as to that sum of $46.79, and it is the order of the court that plaintiff have judgment for $46.79 plus interest. Plaintiff's other demands for relief are denied.

Dated: February 28th, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

[Endorsed]: Filed February 29, 1956.

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[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled matter having come regularly before me on November 4, 1955, for trial, the plain-

tiff being represented by Lloyd H. Burke, Esquire, United States Attorney, by and through James S. Eddy, Esquire, Assistant United States Attorney, and the defendant being represented by Weis and Weis, Attorneys at Law, by and through Alvin Weis, and evidence both oral and documentary having been adduced, and written arguments having been filed herein, the cause having been submitted for decision, and the Court being fully advised, and good cause appearing therefor, the Court makes and enters its Findings of Fact and Conclusions of Law, to wit:

## Findings of Fact

I.

That all of the allegations of the complaint herein are true, except (1) the allegation in paragraph IV of said complaint on page 2, line 25, that defendants acted "wrongfully" when they marketed certain livestock, and (2) the allegation in paragraph IV of said complaint on page 2, lines 26-27, that by marketing said livestock defendants were "thereby converting said livestock to their own use and purposes."

II.

That this Court has jurisdiction herein, pursuant to Section 1345 of Title 28 of the United States Code.

III.

That defendants Henry W. Matthews and Nettie Matthews reside in the above-entitled District and Division; that they conduct a livestock auction busi-

ness in said District and Division under the firm name and style of Yuba City Livestock Auction Company; that they have appeared herein; and that this Court has jurisdiction of the parties and the subject matter of this action.

IV.

That on March 17, 1951, one Wheaton executed a crop and chattel mortgage to the Farmers Home Administration, an agency of the plaintiff; that said mortgage covered farm implements, machinery, and certain livestock and property; that it contained the usual provision that upon default, the mortgagee was entitled to immediate possession of the mortgaged goods; and that said mortgage was duly recorded on March 17, 1951, in Yuba County, California, the county in which Wheaton then resided and in which the property in question was then located.

V.

That prior to November 19, 1951, the plaintiff fully performed all of the acts necessary to record its interest in said chattel mortgage pursuant to California Law.

VI.

That on November 19, 1951, Wheaton defaulted on his obligations to the plaintiff and remained in default from that date until March 2, 1953.

VII.

That during the period in which he was in default, November 19, 1951, to March 2, 1953, Wheaton

fraudulently removed, from time to time, certain of the livestock mortgaged to plaintiff and took them to Sutter County, California, where the defendants' business is located; that Wheaton there had defendants sell the livestock at auction in the regular course of their business and turn the proceeds, less commission, over to him; and that defendants did so, after obtaining Wheaton's signed assurance and warranty that the animals were free and clear of all liens or other encumbrances, including mortgages.

VIII.

That said Yuba County and said Sutter County are adjacent counties in the State of California.

IX.

That defendants sold the animals for a total of $1,526.22; and that from this sum, they subtracted their regular sales commission of 3% (which amounted to $46.79), plus all expenses of the sale, and turned the net proceeds over to Wheaton.

X.

That defendants did not have knowledge of plaintiff's claim or interest in the livestock at any time during the relevant period.

XI.

That during the relevant period, and at all times since, Wheaton was indebted to the plaintiff in an amount exceeding $1,526.22; that plaintiff has never consented to the sale of the livestock in question or

released its lien on said livestock; and that no part of the proceeds of the sale of said livestock has been paid to plaintiff by Wheaton or by defendants.

## Conclusions of Law

I.

That, by the sale of the livestock without the consent of the plaintiff, the Mortgagor tortiously converted said livestock to the damage of plaintiff in the sum of $1,526.22.

II.

That the defendants were the agents of said Mortgagor in the sale of said livestock.

III.

That prior to said sales, defendants had no constructive knowledge or notice of the existence of said mortgage.

IV.

That pursuant to the law of the State of California, the defendants would be liable to the plaintiff for the sum of $1,526.22.

V.

That the law applicable to this action is not the local law, but the Federal Common Law.

VI.

That the defendants are not liable to the plaintiff for the conversion of said livestock in the sum of $1,526.22, but are liable to the plaintiff for money

had and received by them to the use of the plaintiff in the sum of $46.79.

Done in open court this 9th day of May, 1956.

/s/ EDWARD P. MURPHY,
Judge of the District Court.

Approved as to form:

..........................,
Attorney for Defendants.

Lodged April 24, 1956.

[Endorsed]: Filed May 11, 1956.

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In the District Court of the United States for the Northern District of California, Northern Division

Civil No. 7124

UNITED STATES OF AMERICA,
Plaintiff,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of YUBA CITY LIVESTOCK AUCTION COMPANY,
Defendants.

JUDGMENT

The above-entitled matter having come regularly before me on November 4, 1955, for trial, the

plaintiff being represented by Lloyd H. Burke, Esquire, United States Attorney, by and through James S. Eddy, Esquire, Assistant United States Attorney, and the defendant being represented by Weis and Weis, Attorneys at Law, by and through Alvin Weis, and evidence both oral and documentary having been adduced, and written arguments having been filed herein, the cause having been submitted for decision, and the Court being fully advised, and good cause appearing therefor;

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff shall hereby have judgment against the defendants and each of them in the sum of $46.79.

Done in open Court this 10th day of May, 1956.

/s/ EDWARD P. MURPHY,
United States District Judge.

Lodged April 24, 1956.

[Endorsed]: Filed and entered May 11, 1956.

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[Title of District Court and Cause.]

## NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America by and through Lloyd H. Burke, United States Attorney for the Northern District of California, and James S. Eddy, Assistant United States Attorney for said District, hereby appeals to the United States Court of Appeals for the Ninth Cir-

cuit, from the Findings of Fact and Conclusions of Law and Judgment entered in the above-entitled action on May 11, 1956.

Dated: July 6, 1956.

LLOYD H. BURKE,
United States Attorney,

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

[Endorsed]: Filed July 6, 1956.

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[Title of District Court and Cause.]

ORDER

Good cause appearing therefore;

It Is Ordered that time within which the appellant hereto may docket his appeal is extended to include September 4, 1956.

Done in open court this 15th day of August, 1956.

/s/ OLIVER J. CARTER,
United States District Judge.

[Endorsed]: Filed August 15, 1956.

In the District Court of the United States for the Northern District of California, Northern Division

No. 7124

UNITED STATES OF AMERICA,

Plaintiff,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of YUBA CITY LIVESTOCK AUCTION COMPANY,

Defendants.

Before Hon. Edward P. Murphy, Judge.

REPORTER'S TRANSCRIPT

Appearances:

For the Plaintiff:
JAMES S. EDDY, ESQ.,
Assistant United States Attorney.

For the Defendant:
ALVIN WEIS, ESQ.

Friday, November 4, 1955

The Clerk: Case No. 7124, U. S. v. Matthews, trial by Court.

Mr. Eddy: Ready for the Plaintiff.

Mr. Weis: Ready for the Defendant.

The Court: You may proceed, gentlemen. I have

not had an opportunity to examine the pleadings, but they do not appear to be involved.

Mr. Eddy: If I could take a moment to go over them, your Honor, perhaps that would help all of us.

Your Honor, this is a complaint for conversion of certain property which was mortgaged by a third party to the Government and then sold by the defendants, an auction company, at the time the mortgage was in effect and the Government had the right to immediate possession of the property.

An answer was put in and then the anwer was amended, and my analysis of the pleadings indicates that there is very little in the complaint which is at this time denied.

Now I believe paragraphs 1 and 2 of the complaint are admitted. Is that right, counsel? Paragraphs 1 and 2 are admitted in the answer?

Mr. Weis: I think that is right, Mr. Eddy. Just a moment and I will check. Yes, that is correct. [2*]

Mr. Eddy: Paragraph 3 is admitted except for one phrase which is denied by way of its legal effect.

Mr. Weis: We will admit that the mortgage contained the provision alleged, but we deny that it is effective.

Mr. Eddy: Well, that is a matter of proof.

The Court: All right, let's proceed with the evidence.

Mr. Eddy: Paragraph 4 is substantially admitted as well, except for one phrase. We will proceed with the evidence. I do not think it is too complicated, your Honor.

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***Page numbering appearing at top of page of original Reporter's Transcript of Record.**

Mr. Weis: Does the Court understand the succeeding——

The Court: Well, I understand that you filed—is it two amended answers?

Mr. Weis: No, just one.

The Court: Just one.

Mr. Weis: Just the one amended answer.

Mr. Eddy: Paragraph 4 is admitted except for line 24, the first phrase, which says, "Which livestock was covered by said mortgage," isn't that right?

Mr. Weis: Well, yes; of course, we deny any conversion.

Mr. Eddy: Yes.

The Court: All right, let's take the testimony, gentlemen. I do not want to be captious or vexatious, but I have to get back to San Francisco and I want to try this [3] case as expeditiously as possible.

Mr. Eddy: May Mr. Young sit here at the counsel table?

The Government will call Mr. Wheaton.

Mr. Weis: If the Court please, I would like to have Mr. and Mrs. Matthews, the defendants, come up here and sit with me.

The Court: Yes, all right.

ALLEN W. WHEATON

called for the plaintiff, sworn.

Direct Examination

By Mr. Eddy:

Q. Mr. Wheaton, you have given us your name. What is your address, please?

A. Route 1, Box 660, Marysville.

Q. How long have you lived at that address?

A. About nine years.

Q. I hand you two documents, Mr. Wheaton. Do you recognize them? A. Yes.

Q. Do those two documents constitute a mortgage which you executed to the Government of the United States? A. Yes.

Mr. Weis: We will stipulate that they do, if your Honor please. [4]

Mr. Eddy: Very well. They are offered as Plaintiff's Exhibits 1-A and 1-B, your Honor.

The Court: They will be received in evidence and the stipulation will be accepted.

(The documents referred to were marked Plaintiff's Exhibits 1-A and 1-B.)

Q. (By Mr. Eddy): Now you executed this chattel mortgage on the 17th of March of 1951, isn't that correct?

A. The exhibit will speak for itself.

Q. Is that the date on these documents?

A. Well, the original mortgage was in 1947, I think.

Q. What was your answer?

(Testimony of Allen W. Wheaton.)

A. The original mortgage was made out in 1947.

Q. You have had other mortgages before, haven't you?

A. Yes. This is a renewal of the old mortgage, isn't it?

Q. I am referring to the date that you executed this document right here (exhibiting to witness).

A. That is the date.

Q. What is that date, please?

A. 17th day of March.

Q. And the year? A. 1951.

Q. All right. And you mortgaged livestock among other things in that mortgage, did you not? [5] A. Yes.

Q. Is there a list of the livestock there?

A. Yes.

Q. All right. Now referring to paragraph Roman numeral II, sub 4, on the back page, will you read that, please? A. Roman numeral II?

Q. I am referring to sub-paragraph 4, right here (indicating).

A. "All livestock, farm equipment, machinery, tools and other farm personal property now owned, or which may hereby be acquired by the mortgagee during the time this mortgage is effective."

Q. Does it say "hereby" or "hereafter"?

A. "Hereafter."

Q. Then this mortgage covered all your livestock, didn't it? A. Yes.

Q. Now after you entered into this mortgage on the 17th day of March, 1951, did you sell any live-

(Testimony of Allen W. Wheaton.)
stock through the Yuba City Livestock Auction Company? A. Yes.

Mr. Eddy: Your Honor, I believe the pleadings admit that the Yuba City Livestock Auction Company handled these animals. I am not going to ask him that.

The Court: I have seen that. [6]

Q. (By Mr. Eddy): Mr. Wheaton, calling your attention to the complaint in this case, the list appended to paragraph 4 thereof, I will ask you if you sold those animals through the Yuba City Livestock Auction Company? A. Yes, I did.

Q. And did you receive the money that is shown there? A. I did.

Q. Now did the Government of the United States consent to any of those sales enumerated there?

A. No. The only thing, I didn't figure that they belonged to the Government. I bought the pigs myself and I figured they were mine and I got rid of them. They were other pigs than the ones that are put on the mortgage.

Q. Let me see, your answer is—is there some cows in there and some pigs?

A. Yes, two cows.

Q. And those cows were the ones that were described——

A. They were mortgaged property, yes.

Q. They were mortgaged? A. Yes.

Q. All right. Now where did the pigs come from that you sold?

A. I bought them, 42 of them.

(Testimony of Allen W. Wheaton.)

Q. You bought 42 pigs. Did you buy them after you executed this mortgage to the Government? [7]

A. Yes.

Q. And you kept them on your ranch for a while, did you?

A. I bought them after I made this deal with Fritz Ruff.

Q. You also bought them after you made the deal with the Farmers Home Administration, did you not? A. Yes, I imagine.

Q. And were they on your ranch for a while?

A. For a while, yes.

Q. And then you took them down to the Yuba City Livestock Auction Company and sold them, is that right?

A. Yes. I figured since he was furnishing the feed and so forth they would be more apt to belong to Ruff than to the Government, I would say. He was hauling the feed in every morning and he made the deal, and I figured they would be more apt to belong to him, I thought.

Mr. Eddy: Well, I will ask that that go out.

A. The Government wasn't furnishing any feed for them, and there was no feed there for them.

Mr. Eddy: I will ask that that go out, that latter part.

The Court: It may go out as a volunteer statement of the witness.

Q. (By Mr. Eddy): Well, now, the animals that you had in your possession at the time you

(Testimony of Allen W. Wheaton.)

made the mortgage were kept on your ranch, were they not? [8] A. Yes.

Q. And what did you do with the animals that you acquired after you entered into the mortgage with the United States? Did you put them on your ranch, too?

A. I don't know what you mean. The 42, I told you I bought them, I bought them out there.

Q. And they were just mixed in with the animals you had at the time you executed the mortgage?

A. Yes. That is, they were Ruff's pigs.

Q. How about the 42 pigs?

A. The 42 pigs is what I am talking about. They were mixed in with Ruff's pigs.

Q. How about the animals that you had at the time you executed the mortgage?

A. Well, the four cows, I took them and sold them and gave the money to the FHA. I believe there is one stag there I sold that belonged to the Government.

Q. Well, now, you didn't give the money to the FHA concerning any of the animals that are described in the complaint, did you? A. No.

Q. You just kept that, didn't you?

A. Those four sows that were mortgaged, I took and sold them and gave them the money.

Q. You are referring to four sows that were in the [9] original mortgage? A. Yes.

Q. All right. Now around the 1st of November, 1951, you entered into an agreement with Mr. Ruff, did you not? A. Yes.

(Testimony of Allen W. Wheaton.)

Q. And what was the nature of that agreement?

A. Well, he had the pigs out there and he was supposed to get—well, the agreement was he was supposed to get two-thirds of the money I made off of them.

Q. Well, how many hogs were involved?

A. 120.

Q. And where were they when the agreement was made? A. They were on Mr. Ruff's place.

Q. All right. And then were they transported to your place? A. By truck, yes.

Q. Who transported them? A. Mr. Ruff.

Q. And what was the purchase price of these hogs? A. $7,500.

Q. And how was that paid?

A. It was supposed to be paid out of what I made off the sale of the hogs.

Q. Now did you execute a note and chattle mortgage concerning those hogs? [10] A. Yes.

Q. All right. Was that recorded on the 5th of November?

A. Well, it was made out on the 1st. I don't know exactly when it was recorded. I didn't record it.

Q. All right, now, concerning these animals in the complaint, are any of these animals Ruff's animals, or all these the 42?

A. Those are the 42 hogs that I bought.

Q. Is it your testimony that none of the animals described in this complaint were animals which you obtained under the Ruff deal?

(Testimony of Allen W. Wheaton.)

A. Well, no, because the agreement, after I read it over, I imagine they took over anything I brought over. It was the mortgage——

Mr. Weis: I didn't get the answer.

Mr. Eddy: Well, I will ask that everything after the word "no" go out as a voluntary statement as to the law, your Honor.

The Court: That may go out.

Mr. Eddy: You may cross-examine.

Cross-Examination

By Mr. Weis:

Q. Mr. Wheaton, Mr. Eddy, the Government attorney, has asked you with reference to your deal with Mr. Fritz Ruff. Now I will show you a document purporting [11] to be a contract for sale and purchase of a herd of hogs dated November 1st, 1951. I want you to examine that document, examine the signatures, and tell me if that is your signature and if that is the agreement.

A. That is my signature.

Q. All right.

A. I have one like that.

Q. You have a copy? A. Yes.

Q. And that is the original agreement?

A. That is the original agreement.

Mr. Weis: I will ask that this be introduced in evidence.

Mr. Eddy: The Government has no objection to its admission. The materiality is something that the

(Testimony of Allen W. Wheaton.)

Government would like to argue when the time arrives.

The Court: Let it be received in evidence.

(The document referred to was marked Defendants' Exhibit A.)

Q. (By Mr. Weis): Now, at the same time that that agreement was entered into and as a part of the same transaction you have already testified that you gave Mr. Ruff a mortgage on the hogs, is that right? A. Yes.

Q. And I will show you what purports to be the [12] original chattel mortgage, and I want you to examine the signature. Tell me, is that the mortgage which you gave to Mr. Ruff? A. Yes.

Q. It is. Is that your signature? A. Yes.

Mr. Weis: I will ask that the chattel mortgage, if your Honor please, be introduced in evidence and marked with the appropriate number.

The Court: So ordered.

(The document referred to was marked Defendants' Exhibit B.)

Q. (By Mr. Weis): Now, when you entered into that contract and signed that mortgage did you make any payment on account of the purchase price of the 120 hogs? A. No.

Q. In other words, the entire purchase price was incorporated in the agreement, is that right?

A. Yes.

Q. And secured by the chattel mortgage. Now,

(Testimony of Allen W. Wheaton.)
in the Government's complaint your place is described as the northeast quarter of the northeast quarter of Section 30, Township 15 north, Range 3 east, lying about 7 miles northeast of Marysville. Is that your home? A. That is my home. [13]

Q. Is that the only property that you farmed and operated during the period that we are talking about, commencing in March of 1951?

A. Yes.

Q. Your farming operations and your stock growing has been confined to that one place?

A. Yes.

Q. And that is the same property that is described in the Ruff contract, the northeast quarter of the northeast quarter of that same section 30?

A. Yes.

Q. When you made the deal with Mr. Ruff where did you take the 120 hogs that you got from him? A. On that property described.

Q. On that property. And when they were delivered at your place did you commingle them with the hogs that you already had there? A. Yes.

Q. They were just all put out together, is that it? A. Yes.

The Court: Now, wait, I can cut this very short. You knew, did you not, Mr. Wheaton, you understood the terms which were set forth in this crop and chattel mortgage of the United States Department of Agriculture, didn't you? [14]

A. Well, I didn't know too well. I was dumb, I guess.

(Testimony of Allen W. Wheaton.)

Q. Well, you knew enough about it to borrow $1861.42, didn't you? A. Yes.

Q. And you knew the amount of cattle and other livestock that you were getting under the terms of that mortgage, did you not? A. Yes.

Q. Did you say anything about that to these people when you sold it to them?

A. Well, I didn't know they were going to make out a mortgage on the place, as far as that is concerned.

Q. You didn't know what?

A. I didn't know that they were going to make out—I thought they were making a mortgage on the hogs. That is what I thought.

Q. That isn't an answer to my question. My question is did you tell these people that you held these livestock under a mortgage from the United States Government? A. No.

Q. You didn't tell them that? A. No.

Q. They didn't know anything about it?

A. No.

The Court: That is your case, gentlemen. [15]

Mr. Eddy: I didn't understand your Honor.

The Court: I said that is the case.

Mr. Eddy: Well, to be perfectly candid, your Honor, and I am sure counsel knows this, too, this man was prosecuted criminally, and one of the features——

The Court: I am not going to sit here and waste this Court's time with a case of this kind, Mr. Eddy. If anybody should be prosecuted it is Wheaton.

(Testimony of Allen W. Wheaton.)

Mr. Eddy: Well, Wheaton was the man who was prosecuted, but here is the point, your Honor: The sale of hogs and livestock for which the Government is charging the auction company are not the livestock that were under the Ruff contract deal. Otherwise——

The Court: It makes no difference to me. I am going to assume that the defendants here are telling the truth. They went into this as an honest deal. Is that going to be your defense?

Mr. Weis: It certainly is, your Honor.

The Court: I can certainly appreciate that that is what it is going to be, and I am certainly not going to hold these defendants responsible under a situation of this kind. I am not going to do it. If you have any technical defense that you want to bring up—I am putting you on the defensive now, Mr. Eddy.

Mr. Eddy: Well, your Honor, this is a case [16] of conversion, on which there is a good deal of law that I would like to——

The Court: All right, then, well, you submit it. I will take the matter under submission. I don't want to hear any further testimony. I am going to assume your defense as I have indicated.

Mr. Weis: Very well, your Honor.

Mr. Eddy: I don't understand that.

The Court: I have assumed your defense correctly, have I not?

Mr. Weis: Oh, correctly, yes, your Honor. The thing about it is this: We represent a livestock

(Testimony of Allen W. Wheaton.)
auction company situated in Yuba City, which, I would like to call to your Honor's attention, is located in a different county from where Mr. Wheaton lives and where the hogs were kept. Now on certain days certain pigs and hogs and cattle were presented at our auction yards for sale, and I have the sales slips for introduction if your Honor needs them, signed, every one of them, by Mr. Wheaton, in which he warranted to the auction yard that the stock was free of any mortgages or liens and could be legally sold.

Mr. Eddy: May I interject one comment? Your Honor, this man Ruff who we are talking about, who was wronged by this man, is not a defendant in this case.

The Court: I understand that. [17]

Mr. Eddy: I thought for a moment you didn't.

The Court: Oh, no, no, no, I understand that. I have been glancing over these pleadings during the course of your interrogation of this witness. I am very familiar with the pleadings. Fortunately I have a capacity to read quickly. I have read your pleadings and I have read the amended answer, and I have also read, so I may particularize it, the Defendants' Exhibit A.

Mr. Eddy: That concerns animals which are not in issue here.

The Court: How is an auction company going to differentiate between hogs?

Mr. Eddy: Well, there is law, your Honor,

(Testimony of Allen W. Wheaton.)
which shows—I have good law that I wish to submit.

The Court: I don't care how good it is——

Mr. Weis: We have better law to the contrary, your Honor.

Mr. Eddy: Conversion requires no intent, your Honor.

The Court: Oh, I know that; I went through that in law school 30 years ago.

Mr. Eddy: We can frame the issues, I think, very quickly.

The Court: Let's frame the issues and then you can prove them. [18]

Mr. Eddy: Very well.

The Court: But I am indicating to you right now, Mr. Eddy, that you have got a very, very difficult row to hoe in asking me to give the Government judgment in this matter.

Mr. Weis: May I say just this, if your Honor please and Mr. Eddy: One question I think probably should either be testified to by somebody or stipulated, and that is the matter of credits. Now, you haven't as yet——

Mr. Eddy: Well, I don't understand what you mean.

Mr. Weis: Well, payments that you have received on account.

Mr. Eddy: Oh. Well, yes; I was going to put Mr. Young on to establish that.

Mr. Weis: If we might have in the record the amount of payments made so that the——

(Testimony of Allen W. Wheaton.)

The Court: Well, let's put it in the record.

Mr. Eddy: May I ask this witness one more question?

The Court: Surely; you can take all the time you want.

Q. (By Mr. Eddy): Mr. Wheaton, your mortgage to the Government, is it not true—May I ask a leading question?

The Court: Let's hear the question.

Q. (By Mr. Eddy): Calling your attention to paragraph [19] 4 of the complaint again, you see a number of sales, and starting with 11-19-51 and ending 3-2-53. Were you or were you not in default of your contract with the Government during that period of time?

Mr. Weis: Now I think we will have to object to that, if your Honor please, as calling for the witness' conclusion.

The Court: Overruled.

Q. (By Mr. Eddy): Were you behind in payments? A. Yes.

Q. You were? A. Yes.

Mr. Eddy: I have no further questions of this witness, your Honor. You may step down, unless you have further questions of this witness.

Mr. Weis: Well, in view of his Honor's remarks I will not pursue the cross-examination any further.

Mr. Eddy: Mr. Young, will you take the stand?

The Court: A very wise procedure, Mr. Weis.

JUNE YOUNG

called for the plaintiff; sworn.

Direct Examination

By Mr. Eddy:

Q. Mr. Young, what is your address?

A. 218 El Monte Street, Yuba City. [20]

Q. And your occupation, please?

A. I am the County Supervisor for the Farmers Home Administration.

Q. And that is the agency which made the loan which this case is about? A. That is right.

Q. Do you have with you the records and file on Mr. Wheaton?

A. Yes, this is the county office docket.

Q. And how long have you had custody of the records there?

A. I have only been in Yuba City since September 12th of this year.

Q. You are the custodian of those records, are you not? A. Yes.

The Court: Let the records be introduced. I will assume he has produced them in his official capacity——

Mr. Eddy: Oh, very well.

The Court: ——and the Court will order the records to be introduced in evidence.

Mr. Eddy: Very well, your Honor.

(The documents referred to were marked as Plaintiff's Exhibit No. 2.)

Q. (By Mr. Eddy): You have examined these

(Testimony of June Young.)

records, have you not? [21] A. Yes, sir.

Q. Do the records reveal whether or not any consent was given by the Government for the sale of these animals listed in the complaint?

A. No, sir, not of the animals listed on this complaint.

Q. Was there a release and consent given concerning any other animals?

A. Yes, sir; on March 6th—on April 6th, pardon me, 1953, a release was given on four sows.

Q. And how much money was received by the Government in connection with that sale?

A. The sale amounted to $173.95. The Government received all of it.

Q. And was the defendant given credit for that sum on the books?

A. Yes. A copy of the receipt is in the docket.

Mr. Weis: What was the last answer?

A. They were, yes, sir.

Q. (By Mr. Eddy): Was the defendant in default for the period November 19, 1951, to March 2nd, 1953? A. Yes, sir, he was.

Q. And what is the total amount owed, principal and interest, by the defendant at this time?

A. According to the statement of billing received from the area finance office, principal amount of $1861.42 and [22] interest balance of $106.42.

Q. Have there been any payments made since that time?

A. Mr. Wheaton brought a check in, or, rather,

(Testimony of June Young.)

the auction yard brought a check in for approximately, I am not sure of the figure, $218.

Mr. Weis: Do you have that?

Mr. Matthews: That is the one that was lost; the Farmers Home Administration lost it and we gave them a duplicate.

Q. (By Mr. Eddy): Could that have been $228.35? A. Yes, sir, it could have.

Q. You don't have any record of that in the records, but that is something you know of your own knowledge?

A. I know that because I took the check down to Mr. Wheaton to endorse.

Q. And that has been since this six-month semi-annual audit of the account?

A. That is since this bill came out. The billing is dated as of October 11, 1955, and the material on this billing accumulated prior to that. This last payment wouldn't show on it.

Mr. Weis: There is another one, $315.12.

Mr. Eddy: No further questions. You may cross-examine, Mr. Weis. [23]

## Cross-Examination

By Mr. Weis:

Q. Mr. Young, the $1861.42 is the original loan, is it not? A. No, sir, it isn't.

Q. Well, let me call your attention to the starting sentence in the mortgage, "to secure the sum of $1861.42," March 17, 1951.

(Testimony of June Young.)

A. I think that would be the amount of the outstanding balance at the time the mortgage was written up. The original note shows $2,015——

Q. Oh, I see.

A. ——to be the original loan.

Q. Well, all right. Now that is stated right in the mortgage also, is it not?

A. Yes, sir, this $1861.42——

Q. Is the balance due on that $2,015 note?

A. That is right.

Q. And that is the amount that you had coming to you——

A. At the time the mortgage was made.

Q. ——at the time the mortgage was made?

A. Yes, sir.

Q. All right. Now, the mortgage provides for additional advances not in excess of $500 which might be advanced by your organization to provide feed? A. Yes, sir. [24]

Q. Now can you tell me whether or not you ever made such advances?

A. Not having been more familiar with the docket than I am I couldn't tell you without looking.

Q. Well, do your records show any advances?

A. What was the date of the mortgage, sir?

Q. March 17, 1951.

A. '51. No, sir; I don't see any——

Q. No advances? A. No more advances.

Q. All right. Now what is the rate of interest on that note?

(Testimony of June Young.)

A. Five percent on the unpaid balance.

Q. Five percent. And that is running since March 17, 1951? A. Yes, sir.

Q. Now you have testified to one payment of one hundred seventy some odd dollars which you received. That was for stock that went through the Yuba City Auction Company, was it not?

A. That is my understanding.

Q. All right. I want to show you from the check book of the Yuba City Auction Company another check written to Mr. Wheaton and the Farmer Home Administration for $228.35 on August 29—that is this year, is it not—August 29, 1955. Now will you take a look at that? [25]

A. I think this is that last check that I had Mr. Wheaton endorse and sent into our regional attorney.

Q. Well, have you given Mr. Wheaton credit on your books for that?

A. Mr. Wheaton would be given credit on our area finance office records, although that payment went in after this billing was sent to the county office.

Q. Then you admit that the payment was made?

A. Yes, sir.

Q. It has been sent to your office, all right. Now will you look at another checkbook of Yuba City Livestock Auction Company, and I call your attention to another check that is made payable to A. W. Wheaton and the Farmers Home Administration in the sum of $315.12.

(Testimony of June Young.)

Mr. Eddy: What is the date of that.

Mr. Weis: That is November 22, 1954.

Mr. Eddy: What is the amount, 315 what?

Mr. Weis: November 22, 1954.

Mr. Eddy: That is the date. And the amount?

A. $315.12.

Mr. Eddy: May I interrupt a moment: Is it your contention that that amount was paid?

Mr. Weis: Yes.

Mr. Eddy: Do you have a cancelled check?

Mr. Weis: The check never came back yet. [26]

The Court: May I interject to say that I don't see the purpose of this cross-examination.

Mr. Weis: Well, without this in, if your Honor's trend of thought should change, without this evidence in there would be nothing in the record to indicate but what the entire amount is due.

The Court: You are not disputing that the Government made the loan to Wheaton, are you?

Mr. Weis: No, not at all.

Mr. Eddy: I think I understand it, your Honor. As I understand it, if the Government is to recover it should not recover more than what is owed by Mr. Wheaton, even though the conversion was for a greater sum.

The Court: That was plain to me fifteen minutes ago. I understand that.

Mr. Weis: If it may be stipulated that these three payments have been made and received by the Farmers Home Administration, that is all I am trying to prove, and you people haven't got those payments on your records.

Mr. Eddy: Yes, we have two of them. The 315 is the only one we don't have.

Mr. Matthews: That was November, 1954.

Mr. Weis: Well, that was written a year ago.

Mr. Eddy: And you haven't got the check back, apparently. [27]

The Court: This Court is not required to spend its time in an idle act. If you are willing to stipulate that the testimony that may be given by—what is their name, the Ruff people? Is that the name of your client, Ruff?

Mr. Weis: Mr. and Mrs. Matthews.

The Court: If you are willing to stipulate that that is the testimony, then you gentlemen can go into the confines of your offices and brief it and submit it to me and I am going to render my decision, and I assure you it will be a voluble one, because I am going to express myself on this. I think it is perfectly ridiculous for the Government to pursue the prosecution of a case of this character. I am not criticising you, Mr. Eddy, I know that you have to take your orders, but I don't that this is the kind of case that should be brought to the United States District Court.

Now unless you can convince me to the contrary—my mind is open—I am ready to get out of here and go back to San Francisco and attend to more important affairs.

Mr. Eddy: I understand that, your Honor, but is there anything further on the balance due that you want to put in?

Mr. Weis: Well, if I may have your stipulation

that at least those three payments were made, because we made them, and it begins to look like all the money you [28] ever collected on this mortgage Matthews collected it for you and turned it over to you.

The Court: That is the way it looks to me.

Mr. Weis: Now may I have your stipulation in regard to those three payments? As I say, there may have been others; we don't seem to get anywhere in ferreting into this thing, but I know there are those three.

Mr. Eddy: I will stipulate that those three payments were made——

Mr. Weis: Very well.

Mr. Eddy: ——however, I believe that Mr. Young's records show that he was given credit—as to the balance he just announced he was given credit for them, or at least two of them.

Mr. Weis: You are suing for $1,526. Now certainly you could not recover under any circumstances for more than was owing to you.

Mr. Eddy: That is correct.

Mr. Weis: Now you start with a mortgage of $1861.

Mr. Eddy: And there was never enough money paid to reduce the principal amount.

The Court: You left out the 42 cents.

Mr. Weis: And 42 cents, and we have collected and paid to you some seven or eight hundred dollars. [29]

Mr. Eddy: All right; four years old at five per cent, that is 20 per cent.

Mr. Weis: All right, what is one-fifth of——

The Court: Hasn't the Government of the United States more important problems on its hands and haven't I, as a United States Judge, more important problems than a suit for $1,500 in a situation of this character?

Mr. Eddy: I regret to say, your Honor, that I have brought some actions for considerably less than $1500.

The Court: You wouldn't bring them before me.

Mr. Weis: Now if your Honor please, and Mr. Eddy, before we close, could I have your additional stipulation to the effect that your mortgage was not recorded in Sutter County? We talked about that on previous occasions.

Mr. Eddy: I will so stipulate, but it was recorded in Yuba County, which is where the ranch was and where the man lived.

Mr. Weis: It shows on its face that that was done.

Mr. Eddy: Yes. Well, now, your Honor, may I briefly state what I believe to be the issues in this case?

The Court: Certainly, that is your privilege and your duty.

Mr. Eddy: Your Honor, I believe that the Government has shown, and if not I am sure that counsel will stipulate, that Mr. Wheaton entered into a mortgage agreement with the United States; that the mortgage agreement covered certain [30] livestock, and that it had an after-acquired prop-

erty clause in it; that Mr. Wheaton acquired 42 hogs from somewhere—not from Mr. Ruff, though —and he sold some cows that were on the agreement, some after-acquired hogs, through the defendants here, and that they handled the transaction.

Now there is nothing that the Government knows of to indicate that the defendants knew that these hogs were mortgaged to the Government.

I want to furthermore add that the evidence shows that the man was in default and was entitled to the immediate possession of these animals because of the borrower being in default.

So Wheaton sold to the Yuba City Livestock Auction Company, or through them, these various animals to the value of about $1500.

The Government's position is that that was a conversion of these animals and that the auction company is liable therefore, and the Government feels that the intent of the defendants is not a material matter here, and that is the Government's case.

I have one case exactly in point, a California case, and I have three or four others which I would like to give the Court.

The Court: All right, submit it to me, I will read it. I don't need to hear anything from you, Mr. Weis. I am [31] not going to require any testimony on behalf of the defendants.

Mr. Eddy: Is it your Honor's thought that if there is anything about a purchase mortgage in here that the Ruff mortgage has got anything to do with it?

The Court: I don't think so.

Mr. Weis: I have one comment on some of the testimony that went in. I think that Mr. Wheaton stated in response to a question by Mr. Eddy that he sold the livestock to Yuba City Auction Company and I intended to correct that later on if it had gone any further.

Mr. Eddy: I will stipulate it was through them.

The Court: I know. The Court will take judicial knowledge of the manner in which livestock auctions operate. I know something about livestock. I was born and raised in Nevada. I know how these companies operate. The livestock is just brought into the auction yard and the auction sells them. They are not sold to the auction company, they are just put in there and the auctioneer sells them and gets his percentage, is that right?

Mr. Weis: Three per cent in this case.

Mr. Eddy: But I believe under the law the auctioneer is considered to be the agent of the seller. There are some authorities to that effect which I would like to present to the Court. [32]

Mr. Weis: If Mr. Eddy presents points and authorities may I have an opportunity to reply?

The Court: Whatever time you want.

Mr. Eddy: May I have your stipulation that at the conclusion of this case the Government file which has been admitted here may be returned to the department of the Farmers Home Administration?

Mr. Weis: That is satisfactory, and may I likewise have your stipulation that Mr. Fritz Ruff's

documents may be returned to him? Those are the originals and I have photographic copies.

Mr. Eddy: They may be returned right now if you want to photostat them.

The Court: That will be the order.

Mr. Weis: I have photostatic copies of them.

The Court: All right, the matter will stand submitted, gentlemen. I am going to be on the Circuit Court on the 16th of the month and on the 17th I leave for Portland, Oregon, and will be there for the rest of the month of November and all of December, with exception of the holidays, when I will return home. So this is a matter of no immediate moment. You can take all the time you want, Mr. Eddy, and you, Mr. Weis.

Mr. Eddy: Very well, your Honor.

The Court: Don't let it be too long, though. [33]

Mr. Eddy: I intend to do it while I am still thinking about it, your Honor, so it will probably be next week.

Mr. Weis: It is probably the same here, so we will have the——

The Court: The matter will stand submitted then as of the date the final brief is filed.

Mr. Eddy: With counsel's consent I will substitute this photostat for one of the documents, Plaintiff's 1-A, I believe.

Mr. Weis: Thank you.

Mr. Eddy: Thank you, your Honor.

The Court: The Court will be at recess.

## Certificate of Reporter

I, Clarence F. Nyler, Official Reporter, certify that the foregoing 34 pages, comprise a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to type writing, to the best of my ability.

[Endorsed]: Filed November 1, 1956.

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk, of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated.

Complaint.
Amended answer.
Opinion.
Findings of fact & conclusions of law.
Judgment.
Notice of appeal.
Statement of points to be relied upon on appeal.
Designation of the record on appeal.
Order extending time to docket appeal.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 29th day of August, 1956.

C. W. CALBREATH,
Clerk.

By /s/ C. C. EVENSEN,
Deputy Clerk.

---

[Endorsed]: No. 15245. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Henry W. Matthews and Nettie Matthews, doing business under the firm name and style of Yuba Livestock Auction Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed: August 30, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15245

UNITED STATES OF AMERICA,

Appellant,

vs.

HENRY W. MATTHEWS and NETTIE MATTHEWS, Doing Business Under the Firm Name and Style of Yuba City Livestock Auction Company,

Appellees.

## APPELLANT'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL

The Appellant designates the following points as the points upon which it intends to rely upon appeal in the above-entitled matter, to wit:

1. The District Court erred in holding that, under Federal Law, appellees were not liable in conversion to the United States for the value of the livestock, mortgaged to the Farmers' Home Administration, which they sold without the consent of the Farmers' Home Administration.

2. The District Court erred in holding that the liability of appellees was limited to the amount of the commission they received for the sale of the mortgaged livestock.

3. The District Court erred in not entering judgment for the United States in the amount of

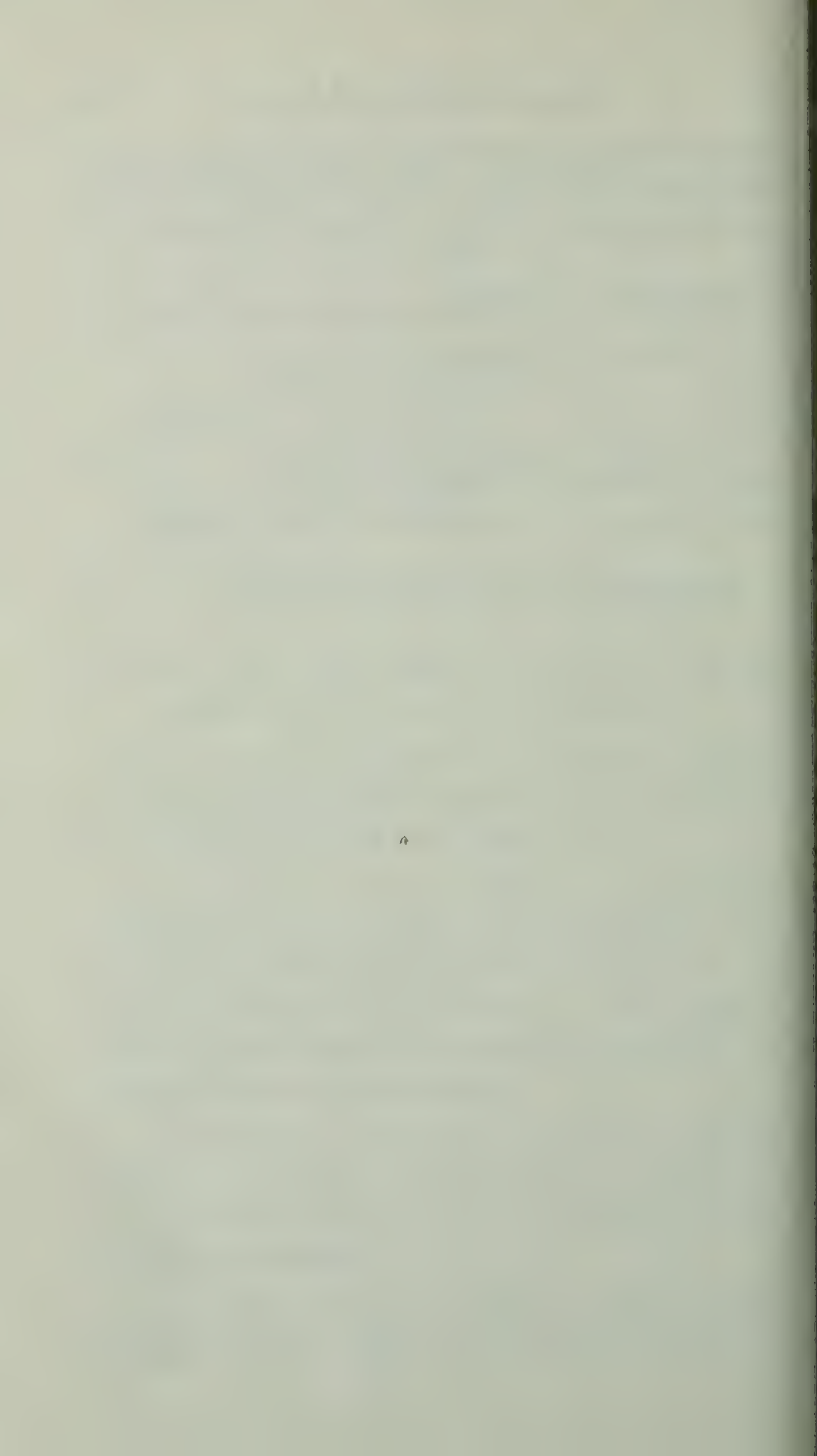
$1,526.22, the market value of the mortgaged livestock which they sold without obtaining the consent of the mortgagee, Farmers' Home Administration.

Dated: Sept. 21, 1956.

LLOYD H. BURKE,
United States Attorney;

By /s/ JAMES S. EDDY,
Assistant U. S. Attorney.

[Endorsed]: Filed September 24, 1956.



No. 15245

# In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

*v.*

HENRY W. MATTHEWS AND NETTIE MATTHEWS, DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF YUBA CITY LIVESTOCK AUCTION COMPANY, APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*

## BRIEF FOR APPELLANT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LLOYD H. BURKE,
*United States Attorney,*

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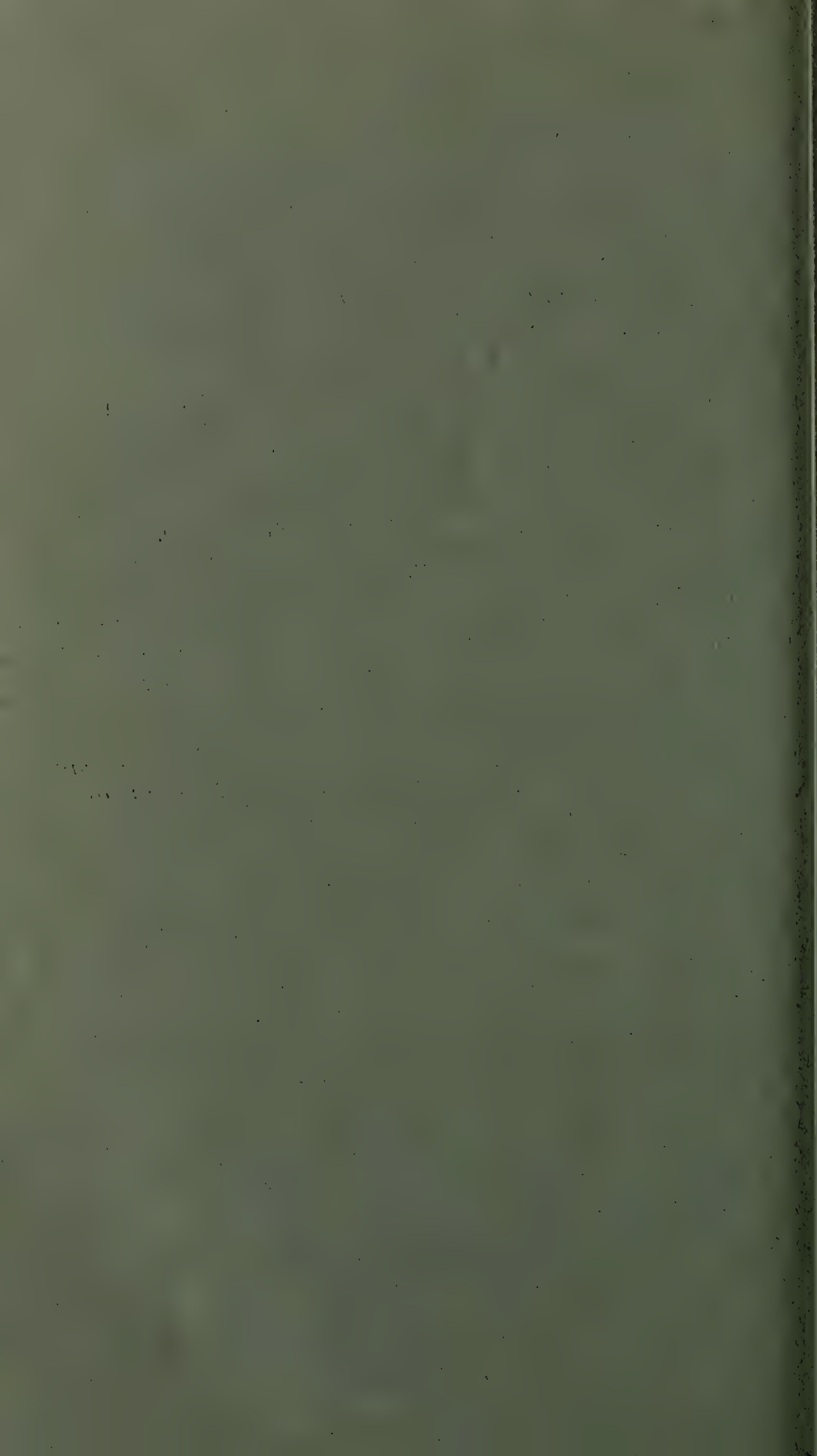

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# In the United States Court of Appeals for the Ninth Circuit

No. 15245

United States of America, appellant

*v.*

Henry W. Matthews and Nettie Matthews, Doing Business Under the Firm Name and Style of Yuba City Livestock Auction Company, appellees

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*

## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

This action was brought by the United States against Henry W. and Nettie Matthews, doing business as Yuba City Livestock Auction Company to recover the reasonable market value ($1,526.22) of certain livestock which were subject to a valid chattel mortgage held by the Farmers Home Administration and which were sold by defendants without the knowledge or consent of the Administration (R. 3–7). The jurisdiction of the District Court over the action rested upon 28 U. S. C. 1345. On May 11, 1956, the United States District Court for the Northern Dis-

trict of California, Northern Division, entered judgment in favor of the United States in the amount of $46.79 (R. 32–33). On July 6, 1956, the Government filed notice of appeal (R. 33–34). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

On March 17, 1951, one Wheaton executed a crop and chattel mortgage in favor of the Farmers Home Administration, an agency of the United States, on certain of his farm chattels, including the livestock which are the subject of this suit (R. 29). The mortgage, which represented security for a Production and Subsistence loan extended by the Farmers Home Administration [1] to Wheaton,[2] contained the customary provision that the mortgagor was not to sell any of the mortgaged property without first obtaining the consent of the mortgagee (R. 4, 28). It further provided that, upon the failure of the mortgagor to perform any of the covenants of the mortgage, the mortgagee was to become entitled to immediate possession of the mortgaged property (R. 11, 29). On the date of execution, the mortgage was duly recorded in Yuba County, California, the county in which

[1] Established under the Farmers Home Administration Act of 1946, 60 Stat. 1072, 7 U. S. C. 1001.

[2] The making of Production and Subsistence loans is authorized by Title II of the Bankhead-Jones Farm Tenant Act, 60 Stat. 1071, 7 U. S. C. 1007. Although not specifically described in the complaint, the loan extended to Wheaton was a Production and Subsistence loan. The forms executed by Wheaton, FHA 30—Crop and Chattel Mortgage and FHA 31—promissory note, are used by the Farmers Home Administration only for Production and Subsistence loans. 6 C. F. R., Chapter III, Subchapter C—"Production and Subsistence Loans," Sections 343.3 (e) and (i).

Wheaton then resided and in which the mortgaged property was then located (R. 11, 29).

Despite his obligation not to do so, between November 19, 1951, and March 2, 1953, Wheaton, without the consent or knowledge of appellant, periodically removed certain of the mortgaged livestock to adjoining Sutter County, California (R. 11, 29–30). The livestock were there delivered to appellees for sale by them at auction in the regular course of business (R. 11, 30). On each occasion, Wheaton warranted in writing that the animals delivered to appellees were free and clear of all liens and other encumbrances (R. 11, 30). Appellees did not have actual knowledge of the existence of the Farmers Home Administration mortgage (R. 11–12, 30).

Upon each sale, appellees turned the proceeds (which totalled $1,526.22) less their customary 3% commission (which totalled $46.79) over to Wheaton (R. 12, 30). Insofar as the record shows,[3] none of these proceeds were applied to Wheaton's debt to appellant, which debt is still due and owing in an amount in excess of $1,526.22 and cannot be satisfied out of Wheaton's current assets (R. 30–31).

On September 30, 1954, this action was brought in conversion against appellees to recover the reasonable market value of the sold livestock, *i. e.,* the price which had been received at auction (R. 3–7). On February 29, 1956, the District Court filed its memorandum opinion holding that appellant was entitled to recover from appellees only the commission which the latter had withheld (R. 10–27). Recognizing that, under

[3] See, however, p. 32, *infra*, fn. 17.

California law, appellees would be liable to appellant for the full market value of the livestock, the court determined that federal law governed (R. 21–25). Relying on the decision of the United States District Court for the Northern District of Iowa in *Drover's Cattle Loan & Investment Co.* v. *Rice,* 10 F. 2d 510, the court then ruled that under federal law a commission merchant is liable to the mortgagee in these circumstances solely for that portion of the proceeds of the sale which are retained by him (R. 25–27).

On May 11, 1956, judgment was entered in favor of appellant in the amount of $46.79 (R. 32–33). This appeal followed (R. 33–34).

## QUESTIONS PRESENTED

1. Whether appellees' liability in conversion to appellant is governed by federal or state law.

2. Whether, in the circumstances of this case, federal law imposes liability in conversion upon appellees for the reasonable value of the mortgaged livestock which appellees sold without the knowledge or consent of the appellant mortgagee.

## SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in holding that, under federal law, appellees were not liable in conversion to appellant for the reasonable market value of the livestock mortgaged to Farmers Home Administration, which they sold without the consent or knowledge of the mortgagee.

2. The District Court erred in holding that the liability of appellees was limited to the amount of the commission they received for the sale of the mortgaged livestock.

3. The District Court erred in not entering judgment for appellant in the amount of $1,526.22, the reasonable market value of the mortgaged livestock which they sold without the consent or knowledge of the mortgagee, less any amount that the mortgagor may have subsequently refunded to appellant out of the proceeds of the sales.

## ARGUMENT

### Appellees are liable in conversion for the full value of the mortgaged livestock here involved, less any amount refunded to appellant out of the proceeds of the sales

#### Introduction and summary

This case presents the identical issues which were recently before the Court of Appeals for the Eighth Circuit in *United States* v. *Kramel,* 234 F. 2d 577. In that case, the District Court had determined that, by reason of *Erie* v. *Tompkins,* 304 U. S. 64, the question as to whether a commission merchant is liable in conversion in the present circumstances is governed by state law. It then applied, with expressed reluctance, a decision of an intermediate appellate court of the State of Missouri (the state in which the alleged conversion took place) which construed the Federal Packers and Stockyards Act, 7 U. S. C. 201, *et seq.,* as

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barring any action in conversion against a livestock commission merchant or "market agency."[4]

The Court of Appeals affirmed. While agreeing with the Government that *Erie* v. *Tompkins* is applicable solely to cases where jurisdiction is grounded upon diversity of citizenship,[5] the court held that state law nevertheless was controlling (234 F. 2d at 580–583). In its view, nothing in the Farmers Home Administration Act of 1946, which established the Administration, reflects a Congressional intent that a uniform federal rule is to be applied in determining the extent of the Government's right to enforce security given to it in connection with loans made by the Administration (234 F. 2d at 580–581).

If the *Kramel* holding that state law controls is correct, it perforce follows that appellant is entitled to recover here the value of the mortgaged livestock

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[4] The District Court concluded: "Therefore, under compulsion of [*Blackwell* v. *Laird*, 236 Mo. App. 1217, 163 S. W. 2d 91], and against the great weight of authority, and against my own judgment of what law on the point ought to be [the commission merchants' motion to dismiss the complaint] must be, and it is hereby sustained."

*Blackwell* v. *Laird* holds that since the Packers and Stockyards Act "prohibits discrimination" against any consignor by a market agency, the court will not penalize a commission merchant for selling stolen or mortgaged property by holding it liable in conversion.

[5] The correctness of this view of the limited scope of Erie requires no extended discussion. See *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 1109; *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 555; *United States* v. *Standard Oil Co.*, 332 U. S. 301, 307; *D'Oench, Duhme & Co.* v. *FDIC*, 315 U. S. 447, 467 (concurring opinion of Mr. Justice Jackson); *American Textile Machine Co.* v. *United States*, 220 F. 2d 584, 587 (C. A. 6); *Siegelman* v. *Cunard White Star*, 271 F. 2d 189, 192 (C. A. 2).

which appellees sold without the consent or knowledge of the Farmers Home Administration—less, of course, any portion of the proceeds which the mortgagor may have refunded to appellant out of the proceeds of the sales (see p. 32, *infra,* fn. 17). As the court below conceded (R. 21), under California law a commission merchant is liable in conversion to the holder of a duly recorded chattel mortgage, whether or not he possesses actual knowledge of the lien at the time the mortgaged property is sold. *Swim* v. *Wilson,* 90 Cal. 126; *Lusitanian-American Development Co.* v. *Seaboard Dairy Credit Corp.,* 1 Cal. 2d 121, 34 P. 2d 139.

Despite this consideration, we do not urge this Court to adopt *Kramel.* To the contrary, it is our position, developed in Point I below, that the Eighth Circuit decision on the matter of choice of law is wrong and the District Court here correctly ruled that federal law is to be looked to.

We show in Point II, however, that the court below erroneously determined that, under federal law, appellees are not liable in conversion to appellant. The federal common law in this area is that common law rule which is generally recognized in the United States. And this general rule is reflected by the California holdings—namely, commission merchants and livestock auctioneers as well as other individuals who sell property which is covered by a duly recorded, valid mortgage are liable in conversion to the mortgagee. The Missouri view otherwise notwithstanding, there is nothing in the Federal Packers and Stockyards Act which calls for a departure from the settled rule. Further, the few decisions which exonerate the

commission merchant on other grounds are equally unsound.

We also show in Point II that there is an additional reason why the general rule should be accepted as constituting federal law. By virtue of 18 U. S. C. 658, it is a felony intentionally to convert property mortgaged to the Farmers Home Administration. While it may be that there was no criminal conversion here on the part of appellees, Section 658 manifests a clear Congressional policy of protecting the Farmers Home Administration from both intentional and non-intentional conversion of its collateral and from the resulting loss of public moneys. This policy should have been, but was not, taken into consideration by the court below in fashioning the federal rule.

## I

### The District Court correctly held that appellees' liability is governed by federal law

#### A. The loan secured by the mortgage in issue here was made under a vast nationwide lending program

The Production and Subsistence Loan underlying the chattel mortgage here involved was an integral part of the Production and Subsistence Loan Program carried out by the Farmers Home Administration[6] under the authority of Title II of the Bankhead-Jones Farm Tenant Act, 7 U. S. C. 1007, *et seq.* The objective of this loan program is to enable farmers and stockmen "to become established successfully in a

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[6] The Farmers Home Administration was established by the Farmers Home Administration Act of 1946, 60 Stat. 1072, 7 U. S. C. 1001.

sound, well balanced system of farming in order to make full and efficient use of their land and labor resources" (6 C. F. R. 342.1 (a)). Toward this end, eligible farmers may obtain loans from the Farmers Home Administration for soil conservation and improvement measures, the purchase of livestock, farm equipment, repairs, feed and insecticides, payment of farm help, cash rent, debts secured by liens, farm buildings, and the meeting of family subsistence needs (6 C. F. R. 342.3).

On applying for a Production and Subsistence Loan, the borrowing farmer must certify in writing that he cannot obtain sufficient credit to meet his needs at rates (not exceeding 5% per annum) and terms for loans of similar size and character in or near the community in which he lives (6 C. F. R. 342.2 (b)). Once a loan application is approved, the borrower must execute a promissory note, standard form FHA–31,[7] which he is required to repay within seven years of the date of the loan (6 C. F. R. 342.4 (b)). At the time the funds are turned over to the borrower, he must also execute a standard form FHA–30 "crop and chattel mortgage,"[8] which provides for a lien in favor of the United States on as much of the livestock and farm equipment of security value owned by the borrower at the time the loan is made as is necessary to protect the interests of the Government (6 C. F. R. 342.5 (c)). The chattel mortgage, a United States Government Printing Office form which contains the same general terms no matter where it is executed,

[7] 6 C. F. R. 343.3 (f).

[8] 6 C. F. R. 343.3 (j).

is then filed or recorded in the county in which the borrower's farm is located (6 C. F. R. 343.5 (c)).

The extensiveness of the loan program is amply reflected by available statistical data. Between March 1, 1946, and June 30, 1953, a total of $614,021,110 was loaned to farmers in every state of the Union, Alaska, Hawaii, Puerto Rico, and the Virgin Islands. Of this amount, almost $11,000,000 represented loans in the State of California alone.[9]

**B. In the absence of an express statutory provision to the contrary, Federal law governs the rights and liabilities of the United States in the administration of programs of this character**

1. The Supreme Court has consistently recognized that where the United States, acting pursuant to the Constitution, Acts of Congress, or treaties, enters into large scale transactions requiring uniform administration, questions of federal rights and liabilities must be uniformly determined by reference to federal law.[10] *Board of Commissioners* v. *United States,* 308 U. S. 343; *Clearfield Trust Co.* v. *United States,* 318 U. S. 363; *United States* v. *Allegheny County,* 322 U. S. 174; *United States* v. *Standard Oil,* 332 U. S. 301. Cf. *Bank of America* v. *Parnell,* 352 U. S. 29. Indeed the

[9] Report of the Loan, Collection and Debt Adjustment Activities, United States Department of Agriculture, Farmers Home Administration, 1954; Report of the Administrator of the Farmers Home Administration, U. S. Department of Agriculture, 1953, p. 24.

[10] Where a federal policy or federal statutes are involved in lawsuits between private litigants, the courts have likewise recognized that federal law must control. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173; *Holmberg* v. *Armbrecht*, 327 U. S. 392; *Dice* v. *Akron C. & Y. R. Co.*, 342 U. S. 359; *Prudence Corp.* v. *Geist*, 316 U. S. 89; Moore's *Commentary on the U. S. Judicial Code*, pp. 309, 340.

very purpose of the supremacy clause in the Rules of Decision Act, 28 U. S. C. 1652,[11] "was to avoid the introduction of disparities, confusions and conflicts which would follow if the Government's general authority were subject to local controls" through the application of state law. *United States* v. *Allegheny County,* 322 U. S. 174, 183. Thus in *Clearfield Trust Co.* v. *United States,* 318 U. S. 363, state law was held inapplicable in an action by the United States on a check issued by the United States Treasury. The Supreme Court held that since the United States exercises a constitutional function or power in issuing commercial paper, and since the issuance of commercial paper by the United States is on a vast scale, federal law must be applied to determine the rights and liabilities of the Government in this regard. Said the Court [318 U. S. at 366–367]:

> We agree with the Circuit Court of Appeals that the rule of *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, does not apply to this action. The rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. This check was issued for services performed under the Federal Emergency Relief Act of 1935, 49 Stat. 115. The authority to issue the check had its origin in the Constitution and the

[11] The Rules of Decision Act, 28 U. S. C. 1652, provides: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

statutes of the United States and was in no way dependent on the laws of Pennsylvania or any other state. Cf. *Board of Commissioners* v. *United States,* 308 U. S. 343; *Royal Indemnity Co.* v. *United States,* 313 U. S. 289. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find their roots in the same federal sources. Cf. *Deitrick* v. *Greaney,* 309 U. S. 190; *D'Oench, Duhme & Co.* v. *Federal Deposit Ins. Corp.,* 315 U. S. 447. In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards. * * *

In our choice of the applicable federal rule we have occasionally selected state law. See *Royal Indemnity Co.* v. *United States, supra.* But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states. The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift* v. *Tyson,* 16 Pet. 1, represented general commercial law rather than a choice of a federal rule designed to protect a federal right,

> it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to these federal questions.

*United States* v. *Allegheny County*, 322 U. S. 174, represents an extension of the *Clearfield* case to cover all cases involving contracts entered into by the United States. The question in *Allegheny* was whether, for the purposes of state taxation, Pennsylvania law determined title to machinery leased by the United States to a war contractor. The Supreme Court rules that state law was inapplicable, holding that the terms of the contract must be construed according to federal law. "The validity and construction of contracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state," (*id.* at 183). And in *United States* v. *Standard Oil Co.,* 332 U. S. 301, the rule of *Clearfield* and its companion cases was held applicable where, as here, "the relations affected are noncontractual or tortious in character" (*id.* at 305).

2. In ruling in *United States* v. *Kramel,* 234 F. 2d 577, that state law was controlling, the Eighth Circuit gave virtually no consideration to the above cases. Instead, although conceding that there was merit in the Government's position that the Production and Subsistence Lending Program requires uniform administration, the court restricted itself to an examination of the terms of the Farmers Home Administration Act (234 F. 2d at 580–581). Finding no express

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provision therein to the effect that federal law is to govern, the court drew the inference that Congress intended state law to be controlling.

This inference, we submit, will not stand analysis. To the contrary, if any conclusion may be properly drawn from the silence of Congress with respect to choice of law, it is that Congress intended that federal law was to be resorted to. This follows from the fact that where Congress has desired state law to control on some facet of the administration of a federal statute of widespread applicability, the statute itself has generally so provided. For example, the Social Security Act stipulates that an applicant's status as the wife of the deceased employee is to be determined by reference to state law (Act of August 28, 1950, c. 809, Title I, Section 104 (a), 64 Stat. 511, 42 U. S. C. 416 (h) (1)). Similarly, governmental liability under the Federal Tort Claims Act is, subject to certain exceptions, determined by the extent, if any, to which "the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the [misconduct] occurred" (28 U. S. C. 1346 (b)). See also, Section 209 (b) of the Federal Coal Mine Safety Act, 30 U. S. C. 479 (b) (state law governs on question as to whether a mine is "gassy" or "gaseous"); Section 7 (c) of the National Banking Act, 12 U. S. C. 36 (c) (establishment of branches by national banks subject to authorization by state statute and to location restrictions imposed by state law on state banks).

In this connection it is to be noted that in the heretofore discussed Supreme Court cases, holding state

law inapplicable, the court did not deem—and could not have consistent with the result it reached—the critical inquiry to be whether there was a specific expression of legislative intent that federal law was to control. Rather, as we have seen, the determinative considerations were (1) that the governmental activity involved was one of vast breadth and scope; and (2) that, since, as a consequence, reference to state law would make "identical transactions subject to the vagaries of the laws of the several states * * *, [t]he desirability of a uniform rule is plain." *Clearfield Trust Co.* v. *United States,* 318 U. S. at 367. As the Supreme Court observed in *United States* v. *Standard Oil* (where the Government sought to recover the expense it incurred when a member of the military service was injured through the defendant's negligence) [332 U. S. at 310–311]:

> * * * [T]he principal, if not the only, effect of [the liability sought] would be to make whole the federal treasury for financial losses sustained, flowing from the injuries inflicted and the Government's obligations to the soldier. The question, therefore, is chiefly one of federal fiscal policy, not of special or peculiar concern to the states or their citizens. And because those matters ordinarily are appropriate for uniform national treatment rather than diversified local disposition, as well where Congress has not acted affirmatively as where it has, they are more fittingly determinable by independent federal judicial decision than by reference to varying state policies.

We stress again that these considerations are equally present in this case.

Further, the Eighth Circuit's expressed reluctance in *Kramel* with respect to "replacing State tort laws affecting property rights" (234 F. 2d at 581) is equally irreconcilable with the relevant Supreme Court holdings. The effect of the Supreme Court's decision in *Clearfield,* for example, was to displace, insofar as Government commercial paper is concerned, state negotiable instrument laws no less affecting property rights. And if the Eighth Circuit's intended emphasis was on the fact that conversion is an action in tort, rather than in contract, *United States* v. *Standard Oil Co.,* of course, provides the total answer.

## II

### Appellees are liable in conversion under federal law

For the foregoing reasons, we agree with the court below that California law, as such, is not applicable here. At the same time, we submit that the court plainly erred in holding that, under federal law, appellees' sale of livestock subject to a duly recorded, valid chattel mortgage held by the Farmers Home Administration did not give rise to liability in conversion to the United States.

#### A. The generally accepted common law rule imposes liability on livestock commission merchants in these circumstances

In *Clearfield Trust Co.* v. *United States, supra,* the Supreme Court pointed out that, while in cases of this character it is for the federal courts to fashion the governing rule of law according to their own standards, general commercial law principles are an

appropriate source of reference. And in *United States* v. *Butt*, 203 F. 2d 643, which like this case was a suit by the United States for the conversion of property on which it held a duly recorded chattel mortgage, the Tenth Circuit determined the right of the Government to recovery by looking to the generally recognized common law rule. This rule, the court found in resolving the conversion issue in favor of the United States, is that (203 F. 2d at 644–645) "[A] mortgagee who has suffered a loss may maintain an action against a person who has wrongfully converted to his own use property included in the mortgage which has been duly filed for record."

That the *Butt* case represents a correct application of general principles of the law merchant is clear. In virtually all states, including California where appellees conduct their business (see p. 7, *supra*), "[a] purchaser of property upon which there is a valid [recorded or filed] chattel mortgage who consumes or sells the property or any part of it is liable to the mortgagee for the damages so occasioned him" (2 *Jones on Chattel Mortgages* (1933) Section 490).[12]

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[12] *Walters* v. *Slimmer*, 272 Fed. 435 (C. A. 7), under the Illinois law; *Denver Live Stock Comm. Co.* v. *Lee*, 18 F. 2d 11, 20 F. 2d 531 (C. A. 8), apply the Colorado law; *Sternberg* v. *Strong*, 158 Ark. 419, 250 S. W. 344; *Adamson* v. *Moyes*, 32 Idaho 469, 184 Pac. 849; *Twin Falls Bank &c. Co.* v. *Weinberg*, 44 Idaho 332, 257 Pac. 31, 54 A. L. R. 1527; *Lawton* v. *Ewing*, 240 Ill. App. 607. *Duke* v. *Strickland*, 43 Ind. 494; *McFadden* v. *Hopkins*, 81 Ind. 459; *Ross* v. *Menefee*, 125 Ind. 432, 25 N. E. 545; *United States Nat. Bank* v. *Great Western Sugar Co.*, 60 Mont. 342, 199 Pac. 245; *Beers* v. *Waterbury*, 21 N. Y. Super. Ct. 396; *More* v. *Western Grain Co.*, 37 N. Dak. 547, 164 N. W. 294; *Bank of Norris* v. *Pates &c. Co.*, 108 S. C. 361, 94 S. E. 881; *Little* v. *Southern Cotton Oil Co.*, 156 S. C. 480, 153 S. E. 462; *Bank of Brookings* v. *Aurora*

"An absolute sale of the mortgaged property by the mortgagor or anyone claiming under him, in exclusion of the rights of the mortgagee, is a conversion of it for which the mortgagee may maintain trover.[13] * * * If a mortgagor, for the purpose of defrauding the mortgagee, sends the mortgaged goods to an auctioneer, by whom they are sold, and the proceeds paid over to the mortgagor, the mortgagee may maintain trover *against the auctioneer,* although the latter did not participate in the fraud and had no knowledge of the existence of the mortgage * * *. *A commission*

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*Grain Co.*, 45 S. D. 113, 186 N. W. 563; *First Nat. Bank of Pipestone* v. *Siman*, 65 S. D. 514, 275 N. W. 347; *Western Mfg. &c.* v. *Shelton*, 8 Tex. Civ. App. 550, 29 S. W. 494, construing Texas statute; *Moore-Hustead Co.* v. *Moon Buggy Co.* (Tex. Civ. App.), 221 S. W. 1032; *First Nat. Bank* v. *Davis* (Tex. Civ. App.), 5 S. W. 2d 753. Where the mortgaged property was sold by the mortgagor without the consent of the mortgagee, and resold by the purchaser, the successive buyers are jointly liable for a conversion. *Union State Bank* v. *Warner*, 140 Wash. 220, 248 Pac. 394.

[13] *Heflin* v. *Slay*, 78 Ala. 180; *Sternberg* v. *Strong*, 158 Ark. 419, 250 S. W. 344 (both mortgagor and purchaser are liable for the sale and purchase of a part of the mortgaged property, made without the consent of the mortgagee); *Mitchell* v. *Mason*, 184 Ark. 1000, 44 S. W. 2d 672; *Ashmead* v. *Kellogg*, 23 Conn. 70; *Brown* v. *Campbell*, 44 Kans. 237, 24 Pac. 492; *Whitney* v. *Lowell*, 33 Maine 318; *American Agro Chemical Co.* v. *Small*, 129 Maine 303, 151 Atl. 555; *Coles* v. *Clark*, 3 Cush (57 Mass.) 399; *Chamberlin* v. *Clemence*, 8 Gray (74 Mass.) 389; *Lafayette County Bank* v. *Mitcalf*, 40 Mo. App. 494; *White* v. *Phelps*, 12 N. H. 382; *Wilson* v. *Russell*, 144 Okla. 284, 290 Pac. 1106; *Hill* v. *Winnsboro Granite Corp.*, 112 S. C. 243, 99 S. E. 836; *Cone* v. *Ivinson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933; *Security State Bank* v. *Clovis Mill & Elev. Co.*, 41 N. Mex. 341, 68 P. 2d 918; *Allis Chalmers Mfg. Co.* v. *Security Elev. Co.*, 140 Kans. 580, 38 P. 2d 138; *First Nat. Bank of Pipestone* v. *Siman*, 65 S. D. 514, 275 N. W. 347 (commission merchants held liable to mortgage in conversion for sale of mortgaged sheep, even though they had no notice of the mortgage).

*merchant is under the same liability in this respect as an auctioneer. Although he sells mortgaged property without any notice of a duly recorded mortgage, he is liable in tort for conversion to the mortgagee".*[14] (2 *Jones on Chattel Mortgages* (1933), Section 460). [Emphasis supplied.]

**B. The Packers and Stockyards Act does not give rise to an exception to the general rule**

Contrary to the holding of the Missouri intermediate appellate court in *Blackwell* v. *Laird*, 236 Mo. App. 1217, 163 S. W. 2d 91, the requirement in Section 205 of the Federal Packers and Stockyards Act, 7 U. S. C. 205 that: "It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services * * *" does not have any effect upon this settled rule. As the Supreme Court itself observed in *Stafford* v. *Wallace*, 258 U. S. 495, 514–515, the purpose of the Act is to secure:

> The free and unburdened flow of livestock from the ranges and farms of the West and

[14] *Sig Ellingson & Co.* v. *DeVries*, 199 F. 2d 677 (C. A. 8) (applying the law of Minnesota); *Sig Ellingson & Co.* v. *Butenbach*, 199 F. 2d 679 (C. A. 8); *Wisdom* v. *Keithley*, 167 S. W. 2d 450 (St. Louis Court of Appeals, 1943); *Birmingham* v. *Rice Bros.*, 238 Iowa 410, 26 N. W. 2d 39; *Citizens State Bank* v. *Farmers Union Livestock Coop. Co.*, 165 Kans. 96, 193 P. 2d 636; *Mason City Production Credit Assn.* v. *Sig Ellingson & Co.*, 205 Minn. 537, 286 N. W. 713, certiorari denied, 308 U. S. 599, motion for rehearing of the petition denied, 308 U. S. 637; *Moderie* v. *Schmidt*, 6 Wash. 2d 592, 108 P. 2d 331; *First Nat. Bank of Pipestone* v. *Siman*, 67 S. Dak. 118, 289 N. W. 416; *Walker et al.* v. *Caviness et al.*, 256 S. W. 2d 880 (Tex. Civ. App.). *Seymour et al* v. *Austin et al.*, 101 F. Supp. 915 (D. Ore.); *Driver* v. *Mills*, 86 A. 2d 724 (Md.); 2 A. L. R. 2d 1124.

> the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country * * * or, still as livestock, to the feeding places and fattening farms * * *. The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act, was exorbitant charges, duplication of commissions, deceptive practices in respect to prices, in the passage of the livestock through the stockyards, all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other.

From this reading of the legislative purpose, there is virtually universal agreement that:

> Congress did not adopt the Packers and Stockyards Act to encourage and protect the operation of fences for handling property stolen or procured by fraud. The Act merely makes it the duty of [commission merchants] to furnish upon *reasonable request without discrimination* reasonable stockyards services. It is not wrongful discrimination to refuse to aid a criminal in his crime, nor is a request that one dispose of property fraudulently procured or stolen a *reasonable request.*

*Birmingham* v. *Rice Bros.,* 238 Iowa 410, 417–418, 26 N. W. 2d 39, 43. [Emphasis in original.] Accord:

*Mason City Production Credit Assn.* v. *Sig Ellingson & Co.,* 205 Minn. 537, 286 N. W. 713, certiorari denied, 308 U. S. 599, motion for rehearing of petition denied, 308 U. S. 637; *Sig Ellingson & Co.* v. *DeVries,* 199 F. 2d 677 (C. A. 8); *Sig Ellingson & Co.* v. *Butenbach,* 199 F. 2d 679 (C. A. 8); *First Nat. Bank of Pipestone* v. *Siman,* 67 S. Dak. 118, 289 N. W. 416; *Citizens State Bank* v. *Farmers Union Livestock Coop. Co.,* 165 Kans. 96, 193 P. 2d 636; *Moderie* v. *Schmidt,* 6 Wash. 2d 592, 108 P. 2d 331; *Walker, et al.* v. *Caviness, et al.,* 256 S. W. 2d 880 (Tex. Civ. App.); *Seymour, et al.* v. *Austin, et al.,* 101 F. Supp. 915 (D. Ore.); *Driver* v. *Mills,* 86 A. 2d 724, 727 (Md.). In the *Moderie* case, the Supreme Court of Washington commented thusly upon the denial of certiorari in *Mason City:* "We note that the Solicitor General of the United States appeared in the Supreme Court and opposed granting of the writ. It seems reasonable to infer that the decision of the Minnesota Supreme Court was satisfactory to the federal authorities charged with the administration of the Packers and Stockyards Act." 108 P. 2d at 334.

No state court construction of a federal statute is, of course, binding on this or any other federal tribunal. *Board of Commissioners* v. *United States,* 308 U. S. 343; *Lyeth* v. *Hoey,* 305 U. S. 188; *Prudence Corp.* v. *Geist,* 316 U. S. 89; *Awotin* v. *Atlas Exchange Bank,* 295 U. S. 209; *Austrian* v. *Williams,* 216 F. 2d 278, 281 (C. A. 2); Rules of Decision Act, 28 U. S. C. 1652; Moore's *Commentary on the U. S. Judicial Code,* p. 309. We submit, however, that these latter

cases—and not *Blackwell*—reflect the correct view of the function of the Packers and Stockyards Act in general and Section 205 in particular. And in this regard, it is worthy of mention in passing that there is even doubt as to whether the Eighth Circuit in *Kramel* properly regarded *Blackwell* as representing Missouri law on the subject. Less than a year after the Kansas City Court of Appeals decided that case, the St. Louis Court of Appeals held a commission merchant liable in conversion in these precise circumstances. *Wisdom* v. *Keithley,* 167 S. W. 2d 450. While not alluding in its opinion either to *Blackwell* or to the Packers and Stockyards Act, the court observed that [167 S. W. 2d at 457]:

> [The commission merchants] were found to have acted innocently and without actual knowledge of the existence of the mortgage, but they are nonetheless personally liable to [the mortgagee] for the conversion of the steers. It was their business, as [the mortgagor's] agents, to ascertain his right to have the steers sold at the auction they conducted, and it is no defense for them to say that they acted under [the mortgagor's] authority, when the fact was that [the mortgagor] had no authority. However innocent they were of [the mortgagee's] claim, and however unaware they were of [the mortgagor's] lack of right to sell, [the commission merchants], by selling the mortgaged steers and remitting the proceeds to [the mortgagor], they became participants in the conversion, and are equally liable with the other defendants who were the purchasers of the steers.

This, as we have seen, is nothing more than a statement of the majority rule.[15]

**C. The general rule is supported by reason as well as the overwhelming weight of authority**

1. As justification for its refusal to follow the general rule respecting the liability of commission merchants, the court below pointed (R. 25) to the decision of the District Court for the Northern District of Iowa in *Drover's Cattle Loan and Investment Co.* v. *Rice,* 10 F. 2d 510. In that case, the court followed the early Tennessee holding in *Frizzell* v. *Rundle,* 88 Tenn. 396, 12 S. W. 918, to the effect that, since the commission merchant is acting merely in the capacity of an agent, he may not be held responsible to the mortgagee in the absence of actual knowledge of the existence of the lien.

To our knowledge, apart from the *Drover's* case, *Frizzell* v. *Rundle* has been adopted on the issue of the liability of a livestock commission merchant only by a Mississippi court—and there by way of dictum. *Dixie Stock Yard* v. *Ferguson,* 192 Miss. 166, 4 So. 2d 724. In virtually every other jurisdiction that has had occasion to consider this issue, *Frizzell* has

[15] The Missouri Supreme Court has not passed directly upon this question. In September 1955, however, that court cited with approval the portion of the district court opinion in *DeVries* v. *Sig Ellingson & Co.*, 100 F. Supp. 781 (D. Minn.), affirmed, 199 F. 2d 677 (C. A. 8) to the effect that the Packers & Stockyards Act was not designed to supersede well established principles of chattel mortgage law. *Houfberg* v. *Kansas City Stockyards Co. of Maine*, 283 S. W. 2d 539, 543–544. In view of this fact, it is subject to considerable question that, should the conflict between *Wisdom* and *Blackwell* reach it at some point, the latter will be adopted by the Missouri Supreme Court.

been expressly or implicitly rejected. For example, in *First National Bank of Pipestone* v. *Siman,* 65 S. Dak. 514, 275 N. W. 347, 349, *Frizzell* was characterized as not only opposed to the great weight of authority but, in addition, unsound in principle. On the latter score, the South Dakota court referred to the basic rule of agency law that "an agent who does acts which would otherwise constitute conversion of a chattel is not relieved from liability by the fact that he acts on account of his principal and reasonably, although mistakenly, believes that the principal is entitled to possession of the chattel." *Restatement of the Law of Agency,* Section 349. See, also, *Meacham on Agency* (2d Ed., 1914), Section 1457.

*Drover's* in no way representing general commercial law (cf. *Clearfield, supra,* pp. 12–13), and in the absence of compelling reasons for repudiating the view of the overwhelming majority of courts, the court below should not have taken it as reflecting the appropriate rule for uniform application throughout the United States in circumstances where federal law governs. We now show that no such compelling reasons exist; that, instead, there is a good and substantial basis, quite apart from the matter of precedential support, for holding appellees liable in conversion as a matter of federal law.

2. The court below suggested (R. 19–20) that, underlying the result in *Frizzell* and *Drover's,* was a belief that it is burdensome for a commission merchant to ascertain the status of the title to livestock brought to him for sale; and that, if he is required to assume that burden to avoid possible liability in

conversion, the necessary effect will be an increase in the commission which is charged for his services. If, however, these were in fact the considerations deemed dispositive by the court in those cases, we submit that they are far outweighed by the deleterious consequences flowing from the immunization of the commission merchant from liability.

As significant as may be the commission merchant's function in our economy, it is assuredly of no greater importance than the economic function which is performed by those who, in the first instance, finance the raising and feeding of the livestock which are marketed through the commission merchant. And, as the Supreme Court of a leading meat packing state pointed out in the course of holding a commission merchant liable to the mortgagee, it is "common knowledge" not only that meat producers (such as Wheaton here) often must obtain loans to carry on their business but, additionally, that this credit can be obtained only "by giving as security chattel mortgages upon the stock being raised and fed for the market." *Mason City Production Credit Ass'n.* v. *Sig Ellingson and Co.,* 205 Minn. 537, 542, 286 N. W. 713, 716, certiorari denied, 308 U. S. 599, motion for rehearing denied, 308 U. S. 637. The accuracy of this observation is underscored by the fact that Congress found it necessary in the public interest to establish a vast lending program to aid the marginal producer unable to obtain credit through private sources at locally prevailing rates of interest, the security for the specific loan being all that the producer customarily has to offer—namely a lien on his livestock, crops and

whatever farm equipment he may possess that is not already mortgaged to the extent of its value. See pp. 8–10, *supra*.

It goes without saying that, absent an effective means for its enforcement, the lien which the lendor obtains as an essential part of the *quid pro quo* for the loan is of little value. And where the security is primarily or exclusively livestock, and the borrower converts it, it is equally plain that the only effective means available for collection of the underlying debt is to look to those—including, if not principally, the commission merchant—who have had some part in the conversion. For the livestock itself will, by the very nature of things, be slaughtered and processed upon its sale, often long before the lendor becomes aware of the borrower's violation of the mortgage agreement.

We think that the fact that the overwhelming majority of both meat producing and meat packing states permit the mortgagee to proceed against the commission merchant in conversion reflects a recognition that an opposite result would transform what were intended to be secured loans into an unsecured lending operation and thus severely restrict the future availability of credit to livestock producers. Implicit, too, in the wide acceptance of the general rule is the realization that, unlike the creditor, the commission merchant is in a position to protect himself—either through an appropriate inquiry into the vendor's title, or, if such is not feasible in the particular situation, through insurance against the contingency of a defect in that title. Presumably, most commission merchants in states such as California, Iowa,

Kansas and Minnesota have undertaken satisfactory protective measures against liability in conversion and have found them to involve no undue burden or expense. This is at least a permissible inference from the fact that there has not been a successful effort (if in fact some serious effort has been made) in any of those jurisdictions to overturn the majority rule, either by legislative enactment or otherwise. Certainly, if that rule proved to be inequitable or unworkable, it would not long have been enforced.

**D. Acceptance of the general rule is further called for by the announced congressional policy in this area**

Leaving aside the above considerations, we think that there is another and independent reason why the court below erred in not holding appellees liable to the United States, as a matter of federal law, for the full value of the mortgaged livestock which they sold without the Farmers Home Administration's consent. As we have noted, in aiding farmers the Government lends money on terms and conditions that are not acceptable to local lending agencies, taking collateral of a less durable type such as livestock and crops. Because of the scope of the program, the Administration does not enjoy even such opportunity as a local private lending institution may have to investigate, check, and foreclose as soon as a borrowing farmer converts mortgaged property. To protect the Farmers Home Administration from conversion and unauthorized disposition of its collateral and from the resultant loss of public funds, Congress has enacted a statute which imposes criminal sanctions on any person who knowingly converts property

mortgaged to the United States. In pertinent part, 18 U. S. C. 658 provides: "Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts, to his own use or to that of another, any property mortgaged or pledged to or held by * * * The Secretary of Agriculture acting through the Farmers Home Administration * * * shall be fined not more than $5,000 or imprisoned not more than five years, or both * * *." Clearly, if appellees, *knowing* that the livestock consigned to them by Wheaton was mortgaged to the United States, took the livestock for sale and turned the proceeds over (as they did) to Wheaton, they would be guilty of a felony under 18 U. S. C. 658. Here, we are dealing not with a criminal violation of that statute, but with an act implicitly condemned by it. Certainly, a congressional intent to protect the Farmers Home Administration from criminal conversions is clear on the face of the Act. No less clear, we maintain, is a congressional policy of protecting the Administration from nonintentional or noncriminal conversions of its collateral and from the resulting loss of public money. Questions as to the extent and nature of the legal consequences of this statutory condemnation not only are questions of federal and not state law but, additionally, must be resolved in the light of the federal policy clearly announced in Section 658. *Deitrick* v. *Greany,* 309 U. S. 190, 200–201; *D'Oench, Duhme & Co.* v. *F. D. I. C.,* 315 U. S. 447.

In the *Deitrick* case, *supra,* the Supreme Court held that the maker of an accommodation note executed to conceal a stock purchase transaction for-

bidden by the National Banking Act was estopped on the ground of public policy, as announced in that Act, to deny lack of consideration in a suit by a receiver of the payee national bank. Specifically rejecting the argument that it was necessary to prove an equitable estoppel the court held that "It is the evil tendency of the prohibited acts at which the statute is aimed, and its aid, in condemnation of them, and in preventing the consequences which the act was designed to prevent, may be invoked by the receiver representing the creditors for whose benefit the statute was enacted" (309 U. S. at 198–199). Reliance was placed in the *Deitrick* case on the fact that the maker of the note was a participant in an illegal transaction. The court, however, did not base its decision on the ground that the execution of the note, as distinguished from the bank's purchase of its stock, was within the express condemnation of the statute. In concluding that the concealment of the stock purchased by means of an accommodation note was unlawful, the court relied on the purposes of the Act to prevent impairment of the capital resources of national banks and to insure prompt discovery of violations through periodic examinations and reports. The legal consequences of the implied statutory condemnation of the transaction were held to be questions of federal law. The Supreme Court resolved the questions in the light of the policy of the National Banking Act and accordingly held defendants liable.

In *D'Oench, Duhme & Co.,* v. *F. D. I. C., supra,* the Federal Deposit Insurance Corporation, which had insured a bank after audit by bank examiners, brought

suit to recover on notes given by defendant to the bank, on an agreement that the notes would not be called, for the purpose of permitting the bank to avoid having its records show any past due bonds. Concededly, defendant and the bank had not arranged to use the notes for the express purpose of deceiving F. D. I. C. on insurance of the bank. Nevertheless, the result of the transaction was to misrepresent the assets of the bank to its creditors and to the bank examiners upon whose audit F. D. I. C. relied. Such a misrepresentation if it had been made knowingly and with intent to influence in any way the actions of the F. D. I. C. would have been a felony under Section 12B (s) of the Federal Reserve Act, 12 U. S. C. 264 (s). The Supreme Court viewed the case as presenting a question of federal law and held that the provisions of the Federal Reserve Act "reveal a federal policy to protect respondent, and the public funds which it administers against misrepresentations as to the securities or other assets in the portfolios of the banks which respondent insures or to which it makes loans." *Id.* at 457. Defendant having violated that policy by causing a misrepresentation *without criminal intent* to do so, was held liable.

In the case at bar, appellees have aided in the conversion of property mortgaged to the United States. Their act, in so doing, was in violation of a federal

policy aimed at protecting the Administration and the public funds. Questions as to their liability are federal questions to be determined in the light of the policy announced by Section 658 and that policy requires that the generally accepted commercial rule (see pp. 17–19, *supra*) be applied to hold defendants liable in conversion. *Deitrick* v. *Greany*, *supra*; *D'Oench, Duhme & Co.* v. *F. D. I. C.*, *supra*.[16]

## CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the cause remanded with instructions to enter judgment for the United States for the full market value of the livestock which appellees sold without the consent of the mortgagee Farmers Home Administration, less any

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[16] It is true that in *Kramel*, the Eighth Circuit held that these cases were distinguishable on the question as to whether state or federal law governed, expressing the opinion that (234 F. 2d at 582) in both "there were either direct expressions in the particular Act involved or clear intimations that Congress intended uniformity of administration of the respective act under federal control instead of use of State law." While we think this distinction without merit (see pp. 13–16, *supra*), it is noted that the Eighth Circuit did not disagree that Section 658 reflected a federal policy which it would have had to take into consideration had it deemed the case to turn on federal law rather than Missouri law. And reading the *Kramel* opinion in its entirety, we think that it contains the plain implication that, had the Eighth Circuit determined that federal law was applicable, it would have held the commission merchant liable.

amount which the mortgagor may have refunded to appellant out of the proceeds of the sales.[17]

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Samuel D. Slade,
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January 1957.

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[17] While it does not appear in the record, we have recently ascertained that, after the complaint was filed in the court below, Wheaton made restitution to the Government in the amount of $280.92. This sum reflects the net sales price of a cow, subject to the mortgage, which appellees sold on Wheaton's behalf on December 3, 1951 (R. 5). The restitution followed the entry by Wheaton of a plea of guilty to the charge that he had converted that cow in violation of 18 U. S. C. 658, *supra*. Insofar as the pertinent records disclose, no restitution has been made with respect to the other converted livestock involved in this case.

Since appellees are entitled to be credited with the above amount, their liability to the United States, while not extinguished, is in a sum less than that demanded in the complaint. In view of the fact that these matters are not of record, and of the additional fact that the cause would have to be remanded in any event for the ascertainment of the amount of interest due the Government, we believe that the credit against appellees' liability in conversion should be applied by the court below in the first instance. We are, of course, prepared to offer in that court the necessary documentary evidence as to the extent of Wheaton's restitution.

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No. 15,245

IN THE

# United States Court of Appeals
## For the Ninth Circuit

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| UNITED STATES OF AMERICA, *Appellant,* vs. HENRY W. MATTHEWS and NETTIE MATTHEWS, doing business under the firm name and style or Yuba City Livestock Auction Company, *Appellees.* | |

**On Appeal from the United States District Court for the Northern District of California, Northern Division.**

## BRIEF FOR APPELLEES.

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No. 15,245

IN THE

# United States Court of Appeals

## For the Ninth Circuit

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| | |
|---|---|
| UNITED STATES OF AMERICA, *Appellant,* vs. HENRY W. MATTHEWS and NETTIE MATTHEWS, doing business under the firm name and style or Yuba City Livestock Auction Company, *Appellees.* | |

**On Appeal from the United States District Court for the Northern District of California, Northern Division.**

## BRIEF FOR APPELLEES.

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### JURISDICTIONAL STATEMENT.

For the reasons and upon the authorities cited by Appellant (pp. 1-2 of Appellant's Brief) the jurisdictional statement of Appellant is accepted by Appellees as correct.

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### STATEMENT OF THE CASE.

Appellant's statement of the case is accepted as correct excepting for the statement set forth in the

second paragraph on page 3 of Appellant's Brief to the effect that Wheaton's debt to Appellant is still due and owing in a sum exceeding $1,526.22 and cannot be satisfied out of Wheaton's current assets.

Wheaton's debt at the time of the trial was very much less than $1,526.22 (R. 53-54-56) and could have been satisfied out of Wheaton's remaining personal property subject to the mortgage. The details pertaining to our assertions contained in this paragraph are hereinafter discussed.

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## ARGUMENT.

Since the opinion of the learned trial Judge has been printed in the record (R. 10 through 27) for avoidance of repetition we shall, by reference, incorporate it in this brief and with the additional matter hereinafter set forth, use it and the authorities therein cited in support of the two important elements of the case, namely,—

1. That a sufficient basis does not exist either in law or in fact for holding Appellees liable to Appellant for conversion.

3. That the case should be decided in accordance with Federal rather than local law.

Point No. 2 requires no further discussion herein. We should like to present a topical review of the matters which we have in mind with reference to No. 1:

**(a) Appellees Had No Notice of Appellant's Mortgage.**

Wheaton's mortgage to the Government (Plaintiff's Exhibit 1) covered:

1. Crops grown and to be grown on Wheaton's ranch until full payment of his indebtedness.

2. Two thousand chickens.

3. Seventeen hogs, including the increase.

4. Five cattle, including the increase.

5. All livestock and personal property subsequently acquired by mortagor during the continuance of the mortgage.

6. Farm equipment, machinery, tools and other farm personal property including an irrigation pumping plant.

Subsequently he bought from one Fritz Ruff one hundred twenty hogs (R. 42-43) and mortgaged them back to Mr. Ruff (R. 43-45) (Defendants' Exhibit B) to secure the purchase price of $7500.00. Ruff's mortgage shows that it was duly recorded in Yuba County (R. 43-45).

Wheaton took the Ruff hogs to his ranch in Yuba County and commingled them with the hogs already there (R. 46).

Subsequently to the Ruff deal he acquired from some other source another herd of forty-two hogs (R. 42) and brought them to his said ranch where they likewise were commingled with the hogs already there.

So far as the record discloses there were no markings or identifying characteristics that would distinguish what we shall call the Ruff hogs from the Government hogs.

From the herd of hogs thus assembled by Wheaton

17 head on the ranch when the Government mortgage was made,

120 head subsequently acquired from Ruff,

42 head subsequently acquired from some other source, plus their increase,

the few hogs involved in Wheaton's improper sales were presented to Yuba City Livestock Auction Company at its place of business at Yuba City in Sutter County, California, for sale in the ordinary course of business, were guaranteed in writing by Wheaton to be free of liens, mortgages and other encumbrances (R. 9-49) and the sales were made in job lots over the period November 19, 1951 to March 2, 1953, inclusive, which brewed this controversy.

We say this,—that Appellees could not have determined by the most searching scrutiny of the recorded mortgages whether the hogs presented for sale were Ruff's hogs or the Government's hogs.

The Government cannot claim a lien on the Ruff hogs under the after acquired property clause of its mortgage that would take precedence over Mr. Ruff's rights because in any event he, Ruff, would have a vendor's lien to secure his sale price that would take first position. To say that Appellees, considering both mortgages, should have impounded the proceeds and sued in interpleader to find the rightful owner of the

funds is to argue an absurdity since the hogs were sold a hog or two at a time over a period exceeding one and one-fourth years.

It is a very rational observation that not even Wheaton could have said for a certainty to which mortgage the hogs belonged.

As a matter of reproduction hogs are prolific. The very authoritative book by Prof. William W. Smith, Professor of Animal Husbandry, Purdue University, entitle "Pork Production" (1937) MacMillan, furnishes the following data:

In brood sows the period of gestation is 114 days (p. 13).

Sows are ready for breeding within a matter of days after farrowing (p. 12).

The average size of the litters, 6 to 11 pigs (pp. 101-102).

Pigs grow rapidly (pp. 98-99-136). A pig will develop into a 150 lb. hog in approximately 200 days from birth (p. 143).

A gilt is ready for breeding at from 7 to 10 months of age (p. 14).

Thus, reasonable attention by the hog raiser, plus the processes of nature would produce an astounding multiplication in the herd during the period from the date of the Government mortgage to and including the period of the questioned sales. Commingling of the three lots to form one blended herd, plus the fact that progeny of the resulting herd would become mature, marketable hogs during the period when the

facts of the case arose add to a confusing situation where no one could tell from a later study of the two recorded mortgages which were whose hogs. This would be particularly true with respect to the hogs separated from the herd and presented by Wheaton at the auction premises of Appellees in another county for sale.

Concede that Wheaton testified on direct examination that most of the sales were made from the forty-two head, how was the auction company to know or to learn that from any inspection of the records. The trial Judge commented (R. 49), "How is the auction company going to differentiate between hogs." It will be noted that the Judge, with impatience, halted the trial during our cross-examination of Wheaton (R. 47), foreclosing us of the opportunity to go into several questions important to our defense, one of which was his identification of the hogs sold. So much for the hogs.

Appellees are charged with converting one 90 pound lamb. Sheep are not mentioned in the mortgage excepting by inference under the language purporting to make the mortgage a lien on subsequently acquired livestock. This is not to our thinking sufficient to charge Appellees with constructive notice that a hog and chicken farmer might, unannounced and unexpectedly, switch over to sheep growing. Even though we be wrong, the value of the lamb as a separate item is neither alleged nor proven.

As to cows, two are mentioned in the mortgage. The record indicates the Government has received settle-

ment for four (testimony of A. W. Wheaton, R. 42). This, if true, would eliminate any possibility of conversion of any cattle. However, in the interest of a forthright presentation of this case, this could be a typing error of the reporter. Possibly the word "sows" is intended. The context would so indicate and the writer's trial notes shed no light on the matter. However, the Government now admits it has received settlement from Wheaton for one cow (Appellant's Brief, footnote page 32). Appellees did not participate in this settlement and knew nothing about it prior to reading Appellant's brief.

The value of the one remaining cow claimed to have been converted appears, from the record, to have been $276.07 (R. 5).

It was found by the Court below that Appellees did not have notice of Appellant's mortgage during the relevant period (R. 30). That is definitely the case so far as actual notice is concerned. The question of its materiality aside, the thing that here engages our attention is whether the fact of recordation in another county was sufficient to impart constructive notice under the established facts. We have discussed the confused and conflicting status of the record so far as hogs are concerned. We have shown that we received a lamb—one lamb—from Wheaton for sale, whereas sheep are not mentioned in the Government's mortgage and while language is included therein serving to disclose his interest in hogs principally, cattle very slightly, there is nothing whatsoever to alert anyone to the possibility that he might also be in-

terested in sheep. Furthermore, as stated in the opinion (R. 13), the California recording statute, Civil Code, Section 2957, is applicable by its expressed terms to creditors of the mortgagor and subsequent purchasers and encumbrancers of the property; and has been uniformly held not to apply to auctioneers who neither have nor claim a property interest in the goods.

Upon the basis of the foregoing discussion and calling the Court's attention to Judge Murphy's cited authorities (R. 13-14) the question of notice should be resolved in Appellees' favor.

**(b) Damage to the Government From the Auction Company's Activities Has Not Been Shown.**

Of all the property included under Wheaton's mortgage (supra page 3) the mortgaged crops have not been realized on, nor the chickens, nor the farm equipment, nor the replacements thereof, nor the increase of the livestock. At the trial at Sacramento we had a witness present who would have testified that on the day preceding the trial Wheaton owned and actually had on his ranch more livestock than was on hand when the Government's mortgage was made, to wit:

19 hogs of 150 lbs. each or better,
9 brood sows,
30 weaners,
1 cow,
9 calves,
1 pumping plant worth $800.00 or more,

the total fair value of which would be considerably in excess of the balance Wheaton owed the Govern-

ment (see note). Further questions as to the balance will be hereinafter discussed.

The record discloses no effort by Appellant to collect from Wheaton on all or any of the remaining security. A judgment in a conversion action is a judgment for damages. The Government has not yet proven that it has been damaged. Not unless and until the Government shall have foreclosed its mortgage and actually sustained some loss after realizing on its remaining security, should any thought be given to holding Appellees for any damages resulting to the Government from the sales of livestock involved herein. To hold otherwise would do violence to the ordinary principles of justice. The Farmers' Home Administration, the Federal agency involved in this case, should not enjoy any indulgences from the Court because of its own negligence. Admittedly the Farmers' Home Administration was organized to make government loans to borrowers of impaired credit (Appellant's Brief 25-26). Wheaton qualified for such a loan. Knowledge that the credit of its borrower was weak will be presumed against Farmers' Home Administration, yet with a district office and an organization here in Yuba City (R. 52) there is no evidence of any supervisory activities or of any checkup on Wheaton on the security over the long period during which the facts of the case developed. Then after the long period of job

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(Note): Due to the abrupt termination of the trial this evidence was not introduced. The Court remarked that our answer would be deemed to be true from which we assume it proper to discuss the probative facts which support the ultimate facts set forth in the denials and averments of the answer. Furthermore, counsel for the Government argue outside the record in their brief (pp. 25-27) and we assume that we are entitled to the same latitude.

lot sales involved herein the Government moved in on the auction company, bringing to the latter the first actual notice of the existence of the mortgage. Thereafter when the auction company sold any livestock for Wheaton it paid the proceeds to the Government (R. 53-54-56-57-59). At least three such payments were made, one for $173.95 (R. 53); one for $228.35 (R. 56); and one for $315.12 (R. 56). The $173.95 payment appears to have been credited (R. 53) to Wheaton's account. The check for the $228.35 payment was lost by the Farmers' Home Administration and the auction company issued and delivered a duplicate (R. 54) which had not been credited at the time of the trial. The check of $315.12 paid to the F. H. A. under date November 22, 1954, had not been returned through bank channels at the time of the trial, approximately one year later (R. 56-57), nor is there any recognizable evidence that it has been credited to Wheaton's account. Any shortcomings with reference to it rest on F. H. A. and not on Appellees. The Sutter County supervisor for F. H. A. testified that at the time of the trial there remained unpaid on Wheaton's mortgage:

| | | |
|---|---|---|
| Principal balance | | $1,861.42 |
| Interest | | 106.42 |
| Total (R. 53.) | | $1,967.84 |
| With the further reduction by the two uncredited payments made by Appellees | $228.25 | |
| | 315.12 | 543.47 |
| The net unpaid balance becomes | | $1,424.37 |

Now counsel for Appellant in their brief (footnote p. 32) acknowledge for the first time, so far as we know, that Wheaton is entitled to further credit for $280.92 for a transaction dating back to 1951 and not yet credited to Wheaton's account at the time of the trial in 1955. This further reduction serves to reduce the unpaid balance to $1143.45. Thus a judgment favorable to the Appellant would wipe out Wheaton's remaining debt. Wheaton would become entitled to a full satisfaction of his mortgage and would be free to go his way with the remaining property described in the mortgage completely unencumbered. A lethargic Government agency characterized by inertia and haphazard business methods would be made whole by having turned against innocent parties —Appellees—who did more, once they had notice of the mortgage, to take care of the agency's interest than did the agency itself. These were the aspects of the case that caused the trial Judge to scold the Department of Justice so vehemently for having instituted the action (R. 47, 58), particularly on Page 58, where the Court commented, "I think it is perfectly ridiculous for the Government to pursue the prosecution of a case of this character. I am not criticising you, Mr. Eddy (the Assistant United States Attorney conducting the trial), I know that you have to take your orders, but I don't (think) that this is the kind of case that should be brought to the United States District Court."

A legitimate concern for the proper use and safeguarding of public funds is to be commended but such can be done and could have been done in this

case by a procedure—foreclosure of Wheaton's mortgage—which would have maintained a higher moral tone than this procedure against Appellees.

We have seldom seen a case where the maxim of jurisprudence "The law helps the vigilant before those who sleep on their rights," California Civil Code, Section 3527, could have better application than in this case.

Out of consideration for the matters discussed in the foregoing topical review of some of the aspects of the case, the learned Judge of the Court below, while awarding a nominal judgment to plaintiff decided the case in a manner satisfactory and acceptable to Appellees.

As stated in an early paragraph of this brief, his opinion and the authorities therein cited in support of the decision are by reference incorporated herein and are relied on by us.

We refer particularly to *Drover's Cattle Loan and Investment Company v. Rice,* 10 Fed. (2d) 510, which followed the earlier case of *Frizzell v. Rundel,* 12 S.W. 918, holding the commission merchant not responsible to the mortgagee in the absence of actual notice of the lien, to be more aptly applicable to the case at bar, considering all the facts and circumstances of the case, than the authorities cited by counsel for Appellant, to support their argument for a reversal. In *Drover's* on page 513, the Court said, after weighing the considerations both ways *"Upon*

*the whole record* I am of the opinion that plaintiff has failed to state a cause of action and that the action should be dismissed." Emphasis added.

In *United States v. Butt*, 203 Fed. (2d) 644, cited by Appellant (Appellant's Brief page 17) the Court by way of dictum said, "Generally a mortgagee *who has suffered loss* may maintain an action against a person who has wrongfully converted to his own uses property included under the mortgage." Emphasis added.

In the case at bar no loss has thus far been shown to have resulted from the activities of Appellees. Appellant still has security unquestionably ample to secure its balance.

The case of *Blackwell v. Laird*, 163 S.W. (2d) 91 (1942) cited by counsel for Appellant in their brief at page 19, furnishes material support to our position. This was an action by Felix G. Blackwell against John M. Laird and G. Thomas Laird, doing business under the name of Laird Brothers Live Stock Commission Company, to recover the value of cattle which were allegedly stolen from the plaintiff by a farm hand, and sold to livestock traders who consigned the cattle to the defendants. From a judgment in favor of the defendants, the plaintiff appealed.

The respondents pleaded and urged by way of defense, that under the "Packers and Stockyards Act" they were required to render market service to all persons applying for such service, and promptly re-

ceive and sell for a commission, without discrimination, all livestock consigned to them for sale and to immediately account to the consignors of said livestock for the proceeds of such sales; that the business of respondents under said Act was a "public utility," and that the operator of a public utility must render service to all who apply for the same, absent actual notice that an applicant was legally not entitled to same.

The sole question presented was whether the respondents, as sellers of stolen cattle, are liable to the appellant, as owner, for their value, even though respondents had no notice or knowledge of appellant's interest in said cattle.

The judgment was affirmed.

Appellant argued that the Court should follow the decision of the Supreme Court of Minnesota in the case of *Mason City Production Credit Assn. v. Ellingson,* 286 N.W. 713, wherein the Court construed the Packers and Stockyards Act and held that while the defendant in that case was a "market agency" under the Act, nevertheless when it sold mortgaged property delivered to it by the mortgagor, it was liable to the mortgagee in conversion even though it had no knowledge of the mortgage.

The Court ruled that the decision of the Minnesota Court while persuasive, was not binding.

We call the Court's attention to the fact that in the California cases cited by Appellant, *Swim v. Wil-*

*son*, 90 Cal. 126, and *Lusitanian-American Development Co. v. Seaboard Dairy Credit Corp.*, 1 Cal. (2d) 121, *mortgaged* property is not involved. In *Swim v. Wilson* the property was *stolen*. In the *Lusitanian-American* it had been sold under a *conditional contract of sale*. A distinction between those cases and the one at bar will be readily discerned. In the *conditional contract of sale case* and in the *stolen* property case, the true owner's property is wrested from him and he suffers actual ascertainable loss. In this chattel mortgage case the mortgagee—the holder of a special interest for security only, rather than the true owner—sues to recover damages for an imaginary loss, not a real one. No loss is shown or proven unless all the security is sold or so far depleted that recovery from the remainder is impossible.

As we approach the conclusion of this discussion we pause to ponder the so-called general rule for the application of which to this case counsel for Appellant argue in their brief. We see it as a rule which has become so shot through by decisions holding to the contrary that its efficacy as a yardstick stands discredited. Reviewing the cases on a nationwide basis one finds here a case where the so-called rule has been applied and there one where it has been rejected. To us it all adds up to a situation where, as was said by the Court in the *Drover's Cattle Loan* case, supra, the Court will apply or reject it as appears befitting in each separate case upon consideration of the whole record thereof. So saying and be-

lieving we respectfully urge that upon study and consideration of the whole record on this appeal the judgment of the District Court should be affirmed.

Dated, Yuba City, California,

March 14, 1957.

Respectfully submitted,

WEIS AND WEIS,

ALVIN WEIS,

*Attorneys for Appellees.*

No. 15245

# In the United States Court of Appeals for the Ninth Circuit

United States of America, appellant

*v.*

Henry W. Matthews and Nettie Matthews, Doing Business Under the Firm Name and Style of Yuba City Livestock Auction Company, appellees

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*

## REPLY BRIEF FOR APPELLANT

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APR - 1 1957

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421362—57

# In the United States Court of Appeals for the Ninth Circuit

No. 15245

United States of America, appellant

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Henry W. Matthews and Nettie Matthews, Doing Business Under the Firm Name and Style of Yuba City Livestock Auction Company, appellees

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*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION*

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## REPLY BRIEF FOR APPELLANT

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The court below held that appellees were not liable to the United States for the reasonable market value of the livestock which they sold without obtaining the consent of the mortgagee, Farmers' Home Administration (R. 10–27). In so holding, the court placed exclusive reliance on the fact that appellees did not have *actual* knowledge of the existence of the lien at the time that the sales were made (*ibid.*). The court recognized that, under the law of the state where the transactions took place (California), appellees would be liable in the circumstances of this case (R. 21). The court held, however, that federal law governs, and that, under that law, actual knowledge is a condition precedent to the imposition of liability in conversion

upon a commission merchant or livestock auctioneer (R. 25–27).

In our main brief we urge that, while the court's determination on the matter of choice of law was correct (despite a contrary decision of the Eighth Circut), its interpretation of federal law is erroneous. In the latter connection, we show there (Br., pp. 16–31) (1) that general commercial law principles are the appropriate source of reference in fashioning the federal rule in this area; (2) that in all but two jurisdictions in the United States (and in all of the leading livestock producing and packing states) a commission merchant is liable to the holder of a prior recorded mortgage even if he does not possess actual knowledge of the mortgage's existence; and (3) that this rule imposing liability is supported not only by the overwhelming weight of authority but, as well, by reason and by congressional enactment.

In their brief, appellees have given hardly more than passing mention either to the single ground upon which the court below based its decision or to our demonstration that the court was in error—seemingly being content, for the most part, to rest upon an incorporation by reference (Br., p. 2) of Judge Murphy's opinion. Instead, the major portion of appellees' brief is addressed to contentions which neither were raised below, by way of answer or otherwise, nor considered by the court. Further, in making these new arguments, appellees have embarked on a major excursion outside the record (Br., pp. 8–9)—offering as justification for doing so the alleged fact that evidence in support of their factual assertions would

have been adduced had the court below not abruptly terminated the trial.[1]

In defending a favorable judgment on appeal, a party is not necessarily restricted to the grounds assigned by the trial court. At the same time, he may not of course ask the appellate tribunal to consider belated contentions which have no foundation in the evidence and in the court's findings of fact derived therefrom. In the circumstances of this case, it is therefore doubtful to what extent appellees' new contentions may properly be raised in this Court. We need not, however, rely on this consideration. For, even if true, appellees' unsupported representations of fact do not detract from the force of the conclusion reached in our main brief that they are liable in conversion as a matter of federal law.

1. It is not disputed that the Government's mortgage was executed and recorded prior to the livestock sales by appellees which occasioned this litigation. Nor is it disputed that, by its terms, the mortgage covered all livestock subsequently acquired by the mortgagor Wheaton.[2] Appellees point (Br., p. 3), however, to the fact that, subsequent to the recordation of the Government's mortgage, Wheaton purchased a number of hogs from one Ruff and, as a

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[1] Appellees further suggest (Br., p. 9) that the Government departed from the record on pp. 25–27 of its brief. An examination of the contents of those pages will reflect, we think, the complete lack of substance to this claim.

[2] The validity of an after-acquired property clause such as the one contained in the mortgage here involved is not in issue.

part of the transaction, executed a purchase money mortgage in the latter's favor. Noting further (Br., p. 3) that Wheaton then commingled these animals with his other hogs, appellees suggest the possibility that some of the hogs which they sold on Wheaton's behalf may have been subject to Ruff's mortgage.

We may assume for present purposes that appellees' conjecture is correct—despite Wheaton's uncontradicted testimony that none of the hogs obtained in "the Ruff deal" were delivered to appellees (R. 43–44). We may also assume the validity of their assertion (Br., p. 4) that Ruff's purchase money mortgage created, as to the hogs encompassed by it, a lien which was superior to the lien created by the previously recorded Government mortgage. These assumptions can be readily made because it does not make the slightest difference here whether Ruff had a prior lien on some, or indeed all, of the hogs sold by appellees.

As appellees themselves recognize (Br., p. 4), irrespective of its priority, the Ruff lien could in no event have the effect of destroying the Government's lien. And it is too well settled to be open to question at this date that one who exercises improper dominion over property which is subject to a valid lien may not interpose as a defense that the property is also subject to a prior lien of a third party. Otherwise stated, the holder of a junior lien may maintain an action in conversion so long as he has the right to immediate possession of the converted property as against anyone but the senior holder and those claiming under him. See *e. g., Wichita Mill and Elevator Co.* v. *National Bank of Commerce,* 102 Okla. 95, 227 Pac.

92; *John Smith Co.* v. *Hardin,* 133 Wash. 194, 233 Pac. 628, modified on other grounds, 136 Wash. 694, 238 Pac. 647; *Draper* v. *Walker,* 98 Ala. 310, 13 So. 595; *Talcott* v. *Meigs,* 64 Conn. 55, 29 Atl. 131; *Citizens Nat. Bank* v. *Osborne-McMillan Elev. Co.,* 21 N. D. 335, 131 N. W. 266; *Sperry* v. *Ethridge,* 70 Iowa 27, 30 N. W. 4; *Moore* v. *Prentiss Tool & Supply Co.,* 133 N. Y. 144, 30 N. E. 736; *Treat* v. *Gilmore,* 49 Me. 34. The Government possessed that right here at the time the sales were made.

In short, had appellees searched the lien records of Yuba County, California (where Wheaton then resided) before selling the hogs delivered to them—as they apparently did not—they would have discovered that *all* of Wheaton's livestock were subject to a Government lien and that, as a consequence, the sale of *any* of the hogs would subject them to potential liability in conversion to the Government. The only legitimate doubt that a record search could have engendered would have been with respect to whether the hogs delivered to them for sale had been bought from Ruff and thus were subject to Ruff's lien *in addition to the Government's lien.* While appellees somehow might be able to avail themselves of this uncertainty in a suit brought against them by Ruff, it scarcely is relevant in this action. The inescapable fact is that, respecting their opportunity to discover the existence of a Government lien on the hogs, appellees were in no different position than they would have been in had the Ruff mortgage not been in the picture at all. The "confusing situation"

which appellees seek to inject into the case (Br., p. 6) simply does not exist.[3]

2. Appellees further assert (Br., p. 8) that they were prepared to present evidence in the court below that, as of the date of trial, Wheaton still possessed sufficient personal property to satisfy his indebtedness to the United States. This consideration alone, appellees contend, bars recovery against them. It is their seeming view that an action in conversion may not be maintained by a mortgagee against a third party unless the mortgagor himself is destitute.

We know of no authority, and appellees cite none, which will support this novel proposition. To the contrary, where (as here) there has been a default by the mortgagor entitling the mortgagee to enforce the security underlying the remaining indebtedness, it is for the latter—and not the converter—to decide which portion of the security is to be looked to. In the context of this case, the matter comes down to this. Upon Wheaton's default, the Government could look to any of the property that was subject to the mortgage. Appellees having exercised dominion over, and disposed of, some of that property without the prior consent of the Farmers' Home Administration, the Government had the right to proceed against them in conversion, the measure of damages being the reasonable value of the property

[3] With respect to appellees' contention as to the lamb they converted (Br., p. 6), suffice it to note once more that the mortgage covered all livestock subsequently acquired by the mortgagor. That the mortgagor may not have been principally engaged in sheep raising does not except the lamb from the operation of the after-acquired property clause.

at the time of conversion (not to exceed the remaining indebtedness of Wheaton and less any amount refunded to the Government out of the proceeds of the sales).

Appellees insist (Br., p. 11) that the effect of the imposition of liability upon them would be to entitle Wheaton "to a full satisfaction of his mortgage" and to enable him "to go his way with the remaining property described in the mortgage completely unencumbered." Such is plainly not the case. As appellees stress (Br., p. 4), they exacted a written warranty from Wheaton that the livestock presented for sale were free of encumbrances (R. 30). Thus, appellees have a claim to indemnity from Wheaton for the amount of the Government's recovery against them. If appellees' representations regarding the extent of Wheaton's present property interests are correct, it is difficult to understand why they did not avoid the necessity of a separate suit for indemnity by impleading Wheaton as a third party defendant under Rule 14 of the Federal Rules of Civil Procedure.[4]

3. Appellees' reliance (Br., pp. 12–14) on *Drover's Cattle Loan and Investment Co.* v. *Rice,* 10 F. 2d 510 (N. D. Iowa), and *Blackwell* v. *Laird,* 236 Mo. App. 1217, 163 S. W. 2d 91, is entirely misplaced. As we show in our main brief, *Drover's* followed an early

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[4] Even were appellees correct in their belief that the existence of other security constitutes a defense in an action of this kind, the cause would still have to be remanded for the taking of evidence and the making of findings on the extent of Wheaton's personal property.

Tennessee decision which has been expressly or implicitly rejected in every jurisdiction that has considered the issue (with the possible exception of Mississippi). See appellant's brief, pp. 17–19, 23–24. Insofar as *Blackwell* is concerned, its interpretation of Section 205 of the Packers and Stockyards Act is in direct conflict with the interpretation given to the section by all other federal and state courts which have been called upon to construe it. See appellant's brief, pp. 19–21. Further, the result in *Blackwell* is irreconcilable with the result reached by another Missouri Court of Appeals in a later case and there is good reason to believe that it would be disapproved by the Missouri Supreme Court. See appellant's brief, pp. 22–23.

## CONCLUSION

For the reasons stated herein, and those set forth in our main brief, it is respectfully submitted that the judgment below should be reversed.

George Cochran Doub,
*Assistant Attorney General.*
Lloyd H. Burke,
*United States Attorney.*
Samuel D. Slade,
Alan S. Rosenthal,
*Attorneys, Department of Justice.*

April 1957.

U. S. GOVERNMENT PRINTING OFFICE: 1957

No. 15238

# United States Court of Appeals

## For the Ninth Circuit

N. 2981

WESTERN MACHINERY COMPANY, a corporation,
*Appellant,*

vs.

NORTHWESTERN IMPROVEMENT COMPANY, a corporation,
*Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION
HONORABLE JOHN C. BOWEN, *Judge*

## PETITION FOR REHEARING

DEAN H. EASTMAN
ROGER J. CROSBY
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Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

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# United States Court of Appeals
## For the Ninth Circuit

| | |
|---|---|
| Western Machinery Company, a corporation, *Appellant*,<br>vs.<br>Northwestern Improvement Company, a corporation, *Appellee*. | No. 15238 |

Appeal from the United States District Court for the Western District of Washington
Northern Division
Honorable John C. Bowen, *Judge*

## PETITION FOR REHEARING

Comes now appellee and petitions this Honorable Court for a rehearing of this cause upon the following grounds:

1. The opinion of this court has confused two distinct and well-established rules of evidence. The first and principal question before the court is: What is appellee's status under the contract? The court, in considering this question, applied a rule of evidence applicable to the question: Did a signatory intend to be obligated under the terms of an initial contract? Appellee concedes it was so obligated. The parol evidence rule does not permit a party to go outside of the contract to prove that it did not intend to be obligated by the terms of an initial contract. On the other hand, an exception to the parol evidence rule does permit a signatory to prove his status under the contract. Appellee submits

that the court has failed to recognize the distinction between the two separate problems and has failed to apply the rule of evidence applicable to the real problem involved in this case.

2. The decision of this court failed to apply the Washington rule applicable to the release of a surety when the surety does not actively consent to be bound by the terms of an extension agreement made between a principal and a creditor.

**The Court Has Confused Two Rules of Evidence**

The appellee sincerely contends that the court's opinion of November 14, 1957, confuses two very well-established rules of evidence, and appellee believes that, in the interest of avoidance of serious error, this court on further reflection will be earnestly desirous of reconsidering its opinion in this case.

Before discussing the rules of evidence to which appellee refers, it would first be in order to briefly review a few salient facts brought out by the court's opinion. The court has before it for construction the appellant's printed form entitled "QUOTATION." It originally provided a "Quotation For Bellingham Coal Mines Company, Inc., c/o Northwestern Improvement Company," and then that name was stricken and the name of "Northwestern Improvement Co." inserted in lieu thereof. The form also provides that "This Quotation will remain in effect for ——— days from date hereof; but the prices in this *proposal* are subject to the seller's prices in effect at the time of shipment, * * * AND ARE SUBJECT TO CHANGE WITHOUT NOTICE." (Italics ours) The quotation provides for a signature

by a representative of the appellant, but does not provide a place for any other signature. On the face of the quotation without explanatory words appears the appellee's stamped name and the signature of its manager of coal operations. The court has used a letter from appellee to appellant, dated February 25, 1952, for the purpose of showing that the quotation was treated by appellee as an order. Yet, on the other hand, the court has refused to consider the effect of the statement in the letter which reads: "As you know, this equipment is being bought for the Bellingham Coal Mines Company at Bellingham, Washington, for which Northwestern Improvement Company is the operating manager, and as such has been duly authorized by the former to purchase this equipment." Furthermore, the court has refused to consider parol evidence concerning a collateral oral agreement made by the parties at the time the appellee's employee placed his signature on the face of the quotation or an earlier quotation for the same equipment made to Bellingham Coal Mines Company.

With all due respect to the court, appellee takes issue with the court's statement on page 8 of its decision that "the idea that the status of the sole signatory to a contract, as promissor, can be shown to be a surety for a third person who has not signed the instrument has no place in the law of sales. This doctrine does apply to an accommodation maker who alone signs a promissory note, and has its roots in the law merchant. Although there is dicta to the contrary, the doctrine is not applied outside this limited field, where it is now generally crystallized in a statute." After a diligent read-

ing of the Washington cases and the authorities from which the Washington court adopted its position on this problem, it is respectfully submitted that this court's statement quoted above is contrary to the Washington rule. Furthermore, neither is it supported by a decision from any other jurisdiction.

In holding that appellee could not introduce parol evidence to show that it was in fact a surety, the court failed to distinguish between two separate and distinct well-established rules of evidence. The first rule, with which appellee has no quarrel and the one upon which this court based its decision, is that an agent may not by parol evidence introduce testimony to show that, by the terms of the initial contract, it did not intend to be obligated thereby. The second rule of evidence, the one which appellee submits is involved in the instant case and the one which at all times previously has been discussed by the trial court and both litigants, is that a party to an agreement, not for the purpose of relieving itself from liability on the basis of the initial contract but for other purposes, may show by parol evidence its true status under the terms of that agreement. This court based its opinion upon the first mentioned rule of law which has no exceptions and with which appellee has absolutely no quarrel. Appellee is not in this action endeavoring to show that it ordered the machinery as an accommodation party, and thus, *ipso facto,* was relieved from liability. It is not appellee's position that it was not initially obligated in some capacity. On the other hand, the capacity under which appellee is bound under the initial agreement is the first and foremost problem before the court. In other

words, on the present record, had the appellant not taken a promissory note from Bellingham Coal Mines Company, hereinafter called Bellingham, appellee concedes it would have no defense.

Appellee believes the court was misled by the trial court's finding on failure of consideration which it criticized. That finding was not made for the purpose of proving or holding that appellee was not initially obligated. Neither appellee nor the trial court endeavored to infer or state that there was ever a failure of legal consideration under the initial order. All reference was to monetary consideration (R. 18), as distinguished from legal consideration. At the time of trial, appellant made the argument, which it later abandoned, that suretyship rules should not apply in the case of a paid surety. Consequently, appellee's proof and the trial court's finding dealt only with monetary consideration. Appellee agrees that there was legal consideration to obligate it under the contract. That, however, as the majority of courts hold, does not preclude it from setting up a defense of release of suretyship liability because of subsequent action by the appellant.

Whether appellee was initially bound is not a problem in this case, but rather the initial status under which appellee was bound is the question to be resolved. Different rules of evidence apply when those questions are presented to a court.

The above quoted statement from this court's opinion and the one case which the court's decision quotes in support of its opinion deal exclusively with the first

legal proposition—that is, whether an accommodation party could offer parol evidence to prove that it was not obligated under the initial contract. Long before trial, appellant conceded that issue and never raised it in the trial court nor in this court. The case quoted by this court, *Union Electric Co. of Missouri v. Fashion Square Building Co.,* Mo. App., 165 S.W.(2d) 284, which neither cites any authority nor has it ever before been cited, merely states the universal rule for the first mentioned legal proposition which has been distinguished by Wigmore on Evidence from the second proposition — that is, can an accommodation party prove its status—for which an entirely different rule of evidence applies. Wigmore, in discussing the circumstances under which parol evidence may be introduced to show the true status of an agent "where the unknown principal was *known* to the obligee but nevertheless not named in the document," states that the rule permits a collateral agreement to be available for the purpose of showing suretyship. 9 Wigmore on Evidence 123. This authority was cited by the Washington court in the sales case of *Zarbell v. Mantas,* 32 Wn.(2d) 920, 922, as a justification for using the rule. Wigmore, at page 124, extensively quoted from *Barbre v. Goodale*, 28 Or. 465, 38 Pac. 67, 43 Pac. 378, which Wigmore says gives the generally accepted law. At the same time, however, the Oregon court recognized and distinguished the first legal proposition—that is, that parol evidence is not admissible to discharge the agent from his obligation on the basis of the initial agreement.

The question in the *Barbre* case, *supra,* was "whether

it is competent to show by parol testimony that a contract executed by and in the name of an agent is the contract of the principal, where the principal was known to the other contracting party at the date of its execution." The Oregon court recognized that there was a split of authority, but that the generally accepted and better view was that such parol evidence was admissible to show the true status of the party signing the agreement.

With all due deference to the court's statement that a party to a sales contract "cannot prove that he signed his own name as * * * surety for another," the Washington Supreme Court, in the *Zarbell* case, *supra,* which relied upon Wigmore, in a clear and unequivocal statement held that, *in sales cases,* parol evidence and facts outside the sales agreement could be introduced to show that a signing party was in fact a surety. That case involves the sale of a car and Mantas signed ostensibly as a purchaser; yet the Washington court said:

> "At the outset, a serious point must be considered, as to whether, under the parol evidence rule, testimony tending to prove that Mantas signed the contract *in another capacity than that indicated on its face,* may be admitted. The matter is in a state of some confusion. See 32 C.J.S. 960, Evidence, §985(d), and cases there cited. The weight of authority, however, seems to be with the Oregon court, which observed, in the case of *Lovell v. Potts,* 112 Ore. 538, 207 Pac. 1006, 226 Pac. 1111:
>
> " 'When the parties to a contract know that one of the parties thereto is a surety, such fact may be shown by parol.'

"See, also, 9 Wigmore on Evidence (3d ed.) 122, §2438.

"Nevertheless, particularly in view of our own case of *Karatofski v. Hampton,* 135 Wash. 139, 237 Pac. 17, we are not prepared to state that there could not be a contract so explicit in its definition of the character of the parties signing it that parol evidence would be inadmissible to qualify it. It is not necessary to so hold here. Although both parties signed as 'purchasers,' the acquaintance blank, on the reverse side of the instrument, is filled out only with reference to the credit standing of Leaper, and is signed by Leaper alone. From this, an inference may be raised that the two parties did not in fact stand upon an equal footing as *copurchasers;* and parol evidence may be admitted to explain their true relationship, 'in order that the intention of their contract might be found and its ambiguity resolved.' *Randall v. Tradewell Stores,* 21 Wn.(2d) 742, 153 P.(2d) 286." (Emphasis supplied) *Zarbell v. Mantas,* 32 Wn.(2d) 920, 204 P.(2d) 203, 204.

The Oregon court, in *Lovell v. Potts*, 112 Or. 538, 207 Pac. 1006, 226 Pac. 1111, to which the Washington court referred, reversed and remanded the case because the lower court refused to permit in evidence a letter *antedating* the contract which would show the appellant's reason for signing the contract. The *Lovell* case, *supra,* in turn, relied upon the earlier Oregon case of *Hoffman v. Habighorst,* 38 Or. 261, 63 Pac. 610, 53 L.R.A. 908. The relationship of the parties in the case before this court is far more ambiguous and confused than in the *Zarbell* case, *supra.* Consequently, in accordance with the rule of that case, the abundance of

evidence here conclusively proving appellee to be a surety was properly admitted by the trial court.

This court also believes a different rule applies to a sales case than to a promissory note case. Such ruling was not supported by authority and is contrary to the Washington cases. The *Zarbell* case, *supra,* a sales case, relies upon the *Lovell* case, *supra,* a construction agreement case, which, in turn, relies upon the promissory note case of *Hoffman v. Habighorst, supra.* Since the Washington court clearly held in the *Zarbell* case that suretyship principles apply to sales cases, that rule must likewise be applied in this instance.

This court also states that the rule is different when there is a sole signatory. Without analyzing whether a sole signatory is significant when the first mentioned rule of evidence comes into play, the cases construing the second mentioned rule of evidence do not require such prerequisite and in fact apply the rule in cases of one signatory. When the courts use the language, "one of the parties," they have never construed that phrase to mean one of two joint parties, but have always construed it to mean any party to a contract even though there is only one party on either side of the agreement. This court's opinion did not cite any cases holding, nor does appellee believe any other courts have ever held, that, as a prerequisite to the introduction of parol evidence to establish suretyship or any other status, the principal must be a signatory to the contract. In the *Hoffman* case, *supra,* cited by the *Lovell* case, *supra,* from which the Washington court took its rule and which has been held to be the leading

case on this subject by both the Ninth Circuit and the Washington Supreme Court (page 9 of appellee's opening brief), the principal was not a signatory. Also, in sales cases involving questions other than suretyship, the courts have permitted parol evidence to show that a third party, whose name does not appear on the documents, is in fact a true party in interest. *Friend Lumber Co. Inc., v. Armstrong Building Finish Co.,* 276 Mass. 361, 177 N.E. 794, 796; *Raymond Syndicate, Inc., v. American Radio & Research Corporation,* 263 Mass. 147, 160 N.E. 821.

*Appellee submits that the opinion in the instant case is the first time that any court or legal writer has ever held that one signatory is significant in the application of the parol evidence rule when proof is offered to show the status of a signatory.*

## This Court Did Not Apply the Washington Rule Applicable to the Release of a Surety

This court, without anlayzing pertinent cases cited by appellee in its brief, held that, even if appellee is a surety it was not discharged by reason of the extension of credit to Bellingham because Mr. McMillan "voted for" the execution of a promissory note "as a member of the Board of Directors of Bellingham" and "Northwestern was not only interested, but was pressing that a promissory note be taken, * * *."

Appellee submits that the record does not show that Mr. McMillan ever voted on the question of whether a promissory note should be given by Bellingham. Neither is there any evidence that Mr. McMillan or appellee was pressing for a promissory note from Bellingham to appellant. On the contrary, appellant asked

for the note. There is evidence to the effect that Mr. Little, Secretary of Bellingham, had board approval for the execution of the note, but there is nothing in the record from which could be inferred that Mr. McMillan, as a director, specifically gave his consent to the execution of the note. The record shows that Mr. McMillan did endeavor to obtain a forbearance, which does not amount to an extension of credit, for Bellingham on the payment of the open account, but the record is very clear that a promissory note, amounting to an extension of credit, was only discussed by the appellant with Bellingham's Secretary, Mr. Little (R. 159, 204, 237).

What is the evidence which prompted the trial court to hold "that defendant did not consent or approve, the execution by Bellingham Coal Mines Company of said promissory note" (Finding VI, R. 12) and, on the other hand, what is the record pertinent to this court's finding which conflicts with that of the trial court? On the day before the final billing for the machinery, July 30, 1952 (Ex. 4), appellant's agent, Mr. Goering, telephoned Mr. McMillan, requesting a conditional sales contract, and Mr. McMillan advised Mr. Goering that he

> "could not answer the question but * * * would refer it to Mr. Ramage, the President of Bellingham Coal Mines Company * * * and he [Mr. Goering] no doubt would hear directly from Mr. Ramage." (R. 146, 147)

Mr. McMillan's next contact with appellant was on August 10th when Mr. Goering telephoned about payment, and Mr. McMillan also told Mr. Goering that he

> "would again telephone Mr. Ramage, the President of the company, in Spokane and inform him

> of my conversation that day with * * * Mr. Goering, * * * " (R. 148)

Subsequent to the giving of the initial order, Mr. McMillan had no other conversation or correspondence with appellant concerning payment until approximately seven months following the delivery of the promissory note (R. 148). Except for the conditional sales contract, there is absolutely nothing in the record to the effect, or from which can be inferred, that any agreement which would amount to an extension of time for payment was discussed between agents of appellant and appellee (R. 159). On August 15th, Bellingham, through its President, sent a partial payment and rejected appellant's request for a conditional sales contract, and stated:

> "Mr. McMillan advises us over the phone of your request that we give a conditional bill of sale on the remaining balance. Offhand we are all very much opposed to it,* * * "

A copy of this letter went to Mr. McMillan (Ex. A-5). Immediately after appellant received Bellingham's letter rejecting the conditional sales contract, Mr. Barshell telephoned Mr. Little in Seattle requesting a promissory note from Bellingham for appellant's credit purposes. Mr. Little's testimony concerning this call was as follows:

> "Well, he called me long distance and stated in substance that the company was somewhat overextended because of all of the contracts they had outstanding, the work that they were doing, and that the bank was pressing them for payment and inquiring about this indebtedness of Bellingham Coal Mines, and I believe that at that time he

> stated to me that they would like to have a chattel mortgage or a conditional sales contract. I told him that we couldn't give any such chattel mortgage, that's my best recollection, that we couldn't [206] do it because it would constitute a preference in my opinion. He then said, 'Well, can you at least give us a promissory note which will draw interest and which we can in turn assign to the bank,' which I think was the American Trust Company, but I'm not positive, and so then that matter was taken up with Mr. Ramage and with the Board of Bellingham Coal Mines." (R. 201, 202)

Mr. Little agreed to give the note, had the note executed by Ramage in Spokane, and on August 23rd forwarded the note to appellant (Ex. A-9). The only individual contact made with Mr. McMillan about the note was Mr. Little's inquiry about the correct balance of the account. The record does not show the directors voted on the note. How board approval was obtained is not explained.

Appellant's counsel in cross-examination attempted to show that Mr. McMillan asked forbearance of payment on the open account, which Mr. McMillan acknowledged. Such request for forbearance, however, is of no significance, as the authorities agree that forbearance must be distinguished from an enforceable extension of time.

> "Mere delay, indulgence, or forbearance to the principal will not discharge the surety. In order to effect his release there must be contract for extension, binding and enforceable at law or in equity." 72 C.J.S. 652 and cases cited therein.

The only evidence or statement in appellant's briefs which could afford a basis for this court's statement that Mr. McMillan was "pressing" relate to his efforts to obtain an extension of time for payment of the note. Mr. McMillan was concerned with an extension of time on the note itself, but, as appellee pointed out in its brief (p. 25), that request came after the note was due and the extension of time had already released the appellee from liability.

The Washington court has gone further than any other court in releasing a surety from liability as a result of extension of credit. (See appellee's brief, page 26.) Whereas the majority of courts say that mere knowledge by a surety of the extension will prevent it from being released, the Washington rule requires that the surety "must actively consent to be bound by the terms of the new agreement." *Thompson v. Metropolitan Building Company,* 95 Wash. 546, 164 Pac. 222. Most certainly, appellant could not have recovered from appellee on the promissory note executed by Bellingham. The surety in the *Thompson* case was familiar with the extension agreement at the time it was made. Futhermore, although it is not mentioned by the decision, the briefs submitted to the Washington Supreme Court reveal that the surety was a stockholder of the principal at all times and was an officer of the principal at the time of the initial agreement.. In setting up this very rigid standard, the Washington court cited *Brandt, Suretyship and Guaranty* (3d ed.), Sec. 379, which states that:

> "It is not necessary that he [surety] should object thereto [an extension] in order to entitle him

> to his discharge. *And even if he signs the agreement for extension as a witness, that fact will not prevent his discharge by such extension.* * * * If he is bound at all, his 'concurrence must bind him by the terms of the new (contract).' " (Emphasis supplied)

Thus, under the Washington rule, the active consent by the surety must bind the surety to the terms of the new agreement, which means that the surety must have bound himself by the terms of his "concurrence." Whatever contact Mr. McMillan had with the note, his actions most certainly did not make appellee liable on the note. The evidence here falls far short of showing "concurrence" and, therefore, under the Washington rule, does not show active consent to the extension so as to keep appellee's liability in force. Manifestly, this is so, because the record is absolutely barren of such showing.

## CONCLUSION

Appellee respectfully submits that this court did not consider the correct rule of evidence applicable to the facts involved. Appellee is not endeavoring to prove that it had not intended to be obligated by the original contract, but rather is endeavoring to prove that it was bound as a surety, and thus, because of a subsequent event—the extension of credit to the principal—the appellee, as surety, was released from liability. Although the parol evidence rule will not permit a surety, agent, or any other party to show that initially he was not bound by the terms of a written contract, an exception to the parol evidence rule does permit a signatory

to show his true status under the contract. In this case, the trial court correctly applied the exception to the parol evidence rule and permitted appellee to prove that it was a surety.

Since the appellee, as surety, did not actively consent to be bound by the terms of the promissory note, which granted the principal an extension of credit, the appellee was released from liability under the terms of the original sales agreement.

Respectfully submitted,

DEAN H. EASTMAN
ROGER J. CROSBY
*Attorneys for Appellee.*

I, ROGER J. CROSBY, counsel for appellee herein, do hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that said petition is not interposed for delay.

ROGER J. CROSBY
*Counsel for Appellee.*

[illegible]

[illegible] In this case the trial court correctly applied the exception [illegible] permitted [illegible] to prove that it was [illegible].

[illegible] the appellee [illegible] did not [illegible] by the terms of the [illegible] the appellee was [illegible] from building [illegible] the terms of the original [illegible] agreement.

Respectfully submitted,

[illegible]

[illegible] J. [illegible]

Attorneys for Appellee.

I, [illegible] J. [illegible], counsel for appellee herein, do hereby certify that in my judgment the foregoing brief is well founded in law and [illegible] is not interposed for delay.

[illegible] J. [illegible]

Counsel for Appellee.